COLEÇÃO THEMIS

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TRABALHOS
THEMIS 2017

32.º CURSO DE FORMAÇÃO DE MAGISTRADOS

THEMIS

CENTRO DE ESTUDOS JUDICIÁRIOS

ejtn

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Capa
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CENTRO DE ESTUDOS JUDICIÁRIOS

THEMIS
Da lei divina à formação judiciária

A palavra "THEMIS" tem origem no verbo grego tithénai e significa estabelecer como norma, referindo-se à lei divina, à justiça ou ao direito.

Na mitologia grega, Themis era considerada a "Deusa do juramento ou da lei" pelo facto de ser invocada nos juramentos prestados em tribunal e por esse motivo tornou-se igualmente conhecida como a Deusa da Justiça.

Na sua qualidade de deusa, Themis comunicava com os homens através de oráculos, que corporizavam mandamentos das leis da natureza aos quais os homens deviam obedecer.

Da Antiguidade ao nosso tempo, a palavra "THEMIS" manteve-se como uma referência de solidez, equilíbrio e rigor na área da justiça, pelo que foi sem surpresa que no ano de 2006, o nome em causa foi escolhido para baptizar uma competição de saberes entre auditores de justiça, criada pelo Instituto Nacional de Magistratura da Roménia (NIM) e o Centro de Estudos Judiciários de Portugal (CEJ).

A primeira edição do THEMIS teve lugar em Bucareste, de 1 a 7 de Abril de 2006, e o êxito da iniciativa justificou a sua continuação nos mesmos moldes durante os três anos seguintes.

Com efeito, o concurso THEMIS teve desde sempre como objectivo principal estimular o conhecimento e o debate entre os futuros magistrados dos diversos Estados-Membros da União Europeia, em áreas temáticas jurídicas de interesse recíproco, promovendo ainda a troca de experiências entre os participantes e o desenvolvimento das competências linguísticas comuns.

Também o formato da competição, inédito, em que cada instituição de formação apresentava uma equipa constituída por três auditores de justiça que se encontrassem nos dois primeiros anos dos cursos para ingresso nas magistraturas, acompanhada por um docente/formador, para discutir um assunto de interesse internacional, suscitou enorme adesão.

A segunda edição do THEMIS decorreu em Lisboa, de 25 a 28 de Setembro de 2007 e contou já com a presença de 13 equipas em representação das entidades de formação de magistrados de 11 países europeus – Áustria, Bélgica, Croácia, Dinamarca, Espanha, Finlândia, Hungria, República Checa, República da Moldova, Roménia e Portugal.

Na sua quarta edição, novamente em Lisboa e em Outubro de 2009, estiveram presentes 17 equipas. Os trabalhos decorreram durante cinco dias consecutivos, para que todas as equipas pudessem apresentar os respectivos trabalhos, que versavam sobre um dos temas da competição à escolha: a) Cooperação Internacional em Matéria Penal; b) Cooperação Internacional em Matéria Civil; c) Interpretação e Aplicação do Artigo 6º da Convenção Europeia dos Direitos do Homem e d) Ética e Deontologia na Profissão de Magistrado.

Do ponto de vista logístico e financeiro, tornou-se difícil para o CEJ e para o NIM continuarem a assegurar a gestão e organização desta actividade ao nível bilateral.

Assim, em 2010, o concurso THEMIS passou a ser organizado pela Rede Europeia de Formação Judiciária (REFJ) de que o CEJ e o NIM são membros de pleno direito, tendo o formato desta competição sido adaptado e alargado de forma a assumir maior relevo no quadro da formação em Direito Europeu.

No âmbito das alterações introduzidas, o THEMIS passou a ter 4 meias-finais, dedicadas a um dos seguintes tópicos:

a) ***Meia-final A**: Cooperação Internacional em Matéria Penal*
b) ***Meia-final B**: Cooperação Internacional em Matéria Civil – Direito Europeu da Família*
c) ***Meia-final C**: Cooperação Internacional em Matéria Civil – Procedimento Civil Europeu*
d) ***Meia-final D**: Ética e Deontologia Judiciárias*

De acordo com o actual Regulamento do THEMIS, cada meia-final pode contar com o número máximo de 11 equipas participantes, dando-se prioridade nas inscrições a equipas de diferentes nacionalidades. Caso não cheguem a inscrever-se 11 equipas de países diferentes, a REFJ poderá seleccionar mais do que uma equipa de um mesmo país, para uma determinada meia-final.

Por seu turno, cada meia-final desenvolve-se em três fases distintas, constituídas pela entrega de um trabalho escrito sobre o tema da meia-final em causa, pela apresentação oral desse trabalho e finalmente, pelo respectivo debate com o júri.

*As equipas vencedoras de cada meia-final, bem como as que se classificarem em segundo lugar (num total de **oito**), serão apuradas para a **Grande Final.***

*A **Grande Final** tem a duração de três dias e meio e divide-se em duas etapas distintas, a saber:*

- A primeira etapa obriga à elaboração de um trabalho sobre uma questão prática de direito, que apenas é anunciada às equipas no primeiro dia da Grande Final e que é subordinada ao tema genérico "Right to a fair trial (Art. 47 of the EU Charter of Fundamental Rights and Art. 6 of the ECHR)".

A entrega do trabalho em causa ocorre necessariamente no final do primeiro dia da competição.

- A segunda etapa é constituída por um debate entre duas equipas, perante o júri da competição e versa um caso prático divulgado pela REFJ duas semanas antes da Grande Final (cada debate tem por base um caso prático diferente).

A equipa vencedora da Grande Final, para além do reconhecimento do elevado mérito do seu trabalho, tem direito a uma visita de estudo a definir pela REFJ. Para além disso, a escola de formação da equipa vencedora pode acolher a organização da Grande Final no ano seguinte.

O concurso THEMIS é integralmente financiado pela REFJ, através do reembolso das viagens e pagamento de um per diem a todos os participantes.

O CEJ participou até hoje em todas as edições do THEMIS, com equipas constituídas por auditores de justiça dos sucessivos cursos normais de formação de magistrados que, ao longo dos anos, têm abordado as diferentes temáticas a concurso.

Em 2017, o CEJ inscreveu três equipas em duas meias-finais do THEMIS, tendo sido possível às três equipas em causa participarem nas duas meias-finais.

Assim, na meia-final A, relativa à Cooperação Internacional em Matéria Penal, o CEJ concorreu com uma equipa que elaborou um trabalho subordinado ao tema: "The European Supervision Order - From Discrimination to Equality".

Na meia-final B, atinente à Cooperação Internacional em Matéria Civil – Direito Europeu da Família, o CEJ participou com duas equipas que, por seu turno, apresentaram trabalhos sobre "Children in post-modern families: the right of children to have contact with attachment figures" e "Surrogacy: a clash of competing rights".

Na meia-final A a equipa portuguesa obteve um honroso quarto lugar, entre as onze equipas a concurso.

Já na meia-final B, o trabalho apresentado pela primeira equipa portuguesa mereceu uma menção honrosa, tendo o trabalho da segunda equipa nacional alcançado o 3.º lugar e sido considerado o melhor trabalho escrito de toda a semi-final.

É de sublinhar que o desempenho relevante ou meritório em actividades internacionais como o THEMIS por parte dos auditores de justiça se repercute positivamente na sua notação final. Com efeito, à classificação final individual de cada auditor, obtida por ponderação das notações obtidas em cada jurisdição, pode acrescer uma bonificação até 0,3 se o trabalho desenvolvido pelo auditor em actividades internacionais em representação do CEJ for considerado relevante ou meritório.

*

Atenta a enorme diversidade de ordenamentos jurídicos dos Estados-Membros da União Europeia, a formação judiciária internacional dos juízes e magistrados do Ministério Público é indispensável à correcta interpretação e aplicação uniforme do(s) direito(s) da União Europeia, sem a qual a igualdade e a protecção dos cidadãos corre sérios riscos.

O Concurso THEMIS, enquanto programa formativo destinado aos futuros juízes e magistrados do Ministério Público europeus, contribui de forma decisiva para promover o conhecimento dos diferentes sistemas jurídicos da União Europeia, aumentando exponencialmente o entendimento, a confiança e a cooperação entre juízes e magistrados do Ministério Público dentro dos Estados-Membros.

Daí a sua importância, de que este e-book dá o testemunho e de que esta colecção que agora se estreia vai passar a dar.

Helena Leitão
Coordenadora do Departamento de Relações Internacionais

Ficha Técnica

Nome:

Trabalhos Themis 2017 - 32.º Curso de Formação de Magistrados

Departamento de Relações Internacionais do Centro de Estudos Judiciários

CENTRO DE ESTUDOS JUDICIÁRIOS

Programa Themis da EJTN

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Themis

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32.º Curso de Formação de Magistrados

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Accompanying Teacher

Alexandre Au-Yong Oliveira

CENTRO
DE ESTUDOS
JUDICIÁRIOS

APRESENTAÇÃO DA EQUIPA

Alexandre Au-Yong Oliveira[1]

O texto que se segue é da co-autoria dos Auditores de Justiça do 32.º Curso normal de formação de Magistrados do Centro de Estudos Judiciários (CEJ), **Sara Isabel da Silva Maia, Carlos Miguel Lopes de Carvalho Rodrigues** e **Emanuel Martins Costa Machado**.

O texto foi elaborado no âmbito do concurso Themis e apresentado na respectiva meia-final A - Cooperação Judiciária em Matéria Penal - que ocorreu em Sofia, Bulgária, de 10 a 13 de Abril de 2017. Coube-me a mim a honra de ser o formador responsável pela participação da delegação portuguesa do CEJ e é em tal qualidade que agora escrevo esta breve introdução.

O texto, denominado "THE EUROPEAN SUPERVISION ORDER: From discrimination to equality", e respectiva apresentação pelos Auditores, foi graduado pelo respectivo júri, composto por 3 reconhecidos especialistas da área, em 4.º lugar num total de 11 trabalhos. Foi considerado, além do mais, um trabalho de excelência, classificação esta atribuída aos 5 primeiros trabalhos apresentados.

Os trabalhos em competição foram elaborados por formandos das magistraturas, oriundos de diversos países da União Europeia (UE) para além de Portugal, em concreto, Hungria, República Checa, Alemanha, Polónia, Estónia, França, Bulgária, Grécia, Roménia e Itália, todos, com excepção da Alemanha[2], apoiados pelas respectivas escolas.

O elevado nível geral dos trabalhos apresentados a concurso revelou, tal como vem sendo habitual no concurso Themis e, em particular, no domínio da cooperação internacional em matéria penal, um grande investimento por parte dos participantes, impulsionados, em regra, pelas diversas escolas nacionais.

Tal investimento significativo revela-se não só pela qualidade geral dos textos escritos mas também pelas apresentações multimédia dos trabalhos, não raras vezes elaboradas em programas informáticos já de alguma sofisticação, como o Prezi, por vezes acompanhados de pequenas obras cinematográficas e/ou telediscos elaborados especificamente para o evento, com alguns participantes a encetar verdadeiras *performances* com figurinos e adereços.

Neste contexto, os "nossos" auditores, pressionados, como se sabe, por uma agenda de formação inicial do CEJ bastante exigente, voluntariaram-se corajosamente para participar na competição em referência, com um tema original, constituído pela análise crítica do instrumento jurídico da UE de cooperação judiciária em matéria penal instituído pela Decisão-Quadro 2009/829/JAI do Conselho de 23 de Outubro de 2009, relativa à aplicação, entre os Estados-Membros da União Europeia, do princípio do reconhecimento mútuo às decisões sobre medidas de controlo, em alternativa à prisão preventiva.

[1] Juiz de Direito, Docente do CEJ.

[2] Curiosamente, a Alemanha não tem uma escola, como o CEJ, exclusivamente dedicada à formação inicial de magistrados, mas antes um sistema de aprendizagem geral coordenado pelas diversas organizações profissionais do foro – magistraturas e advocacia. Sobre este tema pode ver-se, Riedel, J., (2013). Training and Recruitment of Judges in Germany. International Journal for Court Administration. 5(2), pp.42–54. DOI:http://doi.org/10.18352/ijca.12.

Tal instrumento jurídico de fonte europeia encontra-se transposto para o nosso ordenamento jurídico interno, através da Lei n.º 36/2015, de 04 de Maio, mas é pouco conhecido, estudado e aplicado no nosso país, o mesmo sucedendo (do que podemos depreender após a apresentação do trabalho na Bulgária), no resto da UE. Só por este simples facto (mas não só) o trabalho mereceu destaque no concurso, cujos trabalhos incidiram, muitas vezes, sobre instrumentos jurídicos já bastante estudados e de aplicação mais habitual, como é o caso do mandado de detenção europeu.

Para além, portanto, da pressão da agenda de formação inicial do CEJ conatural a qualquer auditor de justiça, acrescia para os auditores participantes este investimento no Themis. Foi, no entanto, com prazer e entusiasmo que o texto foi por diversas vezes discutido entre os auditores-autores e eu.

Creio que o concurso e respectiva participação trazem consigo uma real aproximação entre os futuros magistrados europeus, não só pelo necessário desenvolvimento técnico de um domínio do Direito ainda complementar do direito interno mas, cremos, já transversal a todo o sistema jurídico-penal[3], mas também pelo próprio contacto pessoal na intensa semana de realização do concurso.

O balanço é, pois, obviamente positivo, quer pela qualidade da nossa participação, quer pelo contacto pessoal europeu inerente ao concurso Themis, dele derivando um rosto de contornos mais precisos que se imprimem na memória, potenciando a inevitável cooperação judiciária futura na UE, baseada como é no princípio do reconhecimento mútuo.

**

[3] Apenas para recordar alguns dos mais recentes instrumentos europeus desenvolvidos no âmbito da cooperação judiciária em matéria penal, podemos referir as seis Directivas sobre garantias processuais dos arguidos, incidindo, em síntese, sobre o direito a intérprete e tradução (2010/64/EU), o direito à informação (2012/13/EU), o direito a advogado (2013/48/EU), o princípio da presunção da inocência e o julgamento na ausência (2016/343), os direitos de arguidos menores de idade (2016/800) e o direito a apoio judiciário (2016/1919). A todos estes instrumentos acresce, como é sabido, a importante Directiva 2014/41/UE relativa à decisão europeia de investigação em matéria penal.

1.

1.1. EUROPEAN SUPERVISION ORDER: FROM DISCRIMINATION TO EQUALITY

Team Portugal

Carlos Rodrigues | Emanuel Machado | Sara Maia

Accompanying Teacher

Alexandre Au-Yong Oliveira

CENTRO
DE ESTUDOS
JUDICIÁRIOS

EUROPEAN SUPERVISION ORDER

From discrimination to equality

Trainees:

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§1. The international cooperation in criminal matters

The European Union (hereinafter "EU"), which had its origin focused on the creation of a common market, a customs union and the development of common policies, is actually supported by ideals that surpass the economic and financial matters, and which already reach a wide range of common interests, namely social, cultural, security and justice.

The Maastricht Treaty, or the EU Treaty, established the European policy based on three pillars: the Pillar I, relating to the Economic Policy (Community Pillar); the Pillar II, relating to the Common Foreign and Security Policy (Intergovernmental Pillar) and Pillar III, relating to the Justice and Internal Affairs (Intergovernmental Pillar). This third pillar had the purpose of combating criminal offences and contributing to the free movement of persons, being exactly here that the issue of the International Cooperation in criminal matters was inserted[1].

The Amsterdam Treaty, dated of 1997, complemented the Maastricht Treaty, improving the judicial and police cooperation policies initiated therein and, in accordance with the free movement principle, established as the EU purpose the creation of a freedom, security and justice area[2].

In the view of this intention, the Tampere European Council of October 15th and 16th, 1999 agreed on a number of measures to implement the freedom, security and justice area. It has, therefore, been recognized as the turning point of judicial cooperation within the EU and has paved the way for the creation of the European judicial area, by establishing the principle of mutual recognition and promoting legislative harmonization.

In this context, the principle of mutual recognition, being built on the idea of reciprocal trust that should guide the relation between Member States, in order to an automatic and more direct acceptance of judicial decisions rendered in other countries, including herewith judgments and judicial or police orders, within the context of the various legal systems which compose the EU. Thus, the principle of mutual recognition, considered the cornerstone of international criminal cooperation, requires that under an idea of trust between judicial systems, a foreign judgment is recognized as if it was issued by a national entity.

In the Lisbon Treaty, the States demonstrated a strong determination to ensure a high level of security, through the implementation of measures to prevent crime, coordination and cooperation measures between police and judicial authorities or other relevant authorities, through the mutual recognition of judicial decisions and, if necessary, through the harmonization of criminal law, in order to ensure the establishment of the freedom, security

[1] The pillars structure was abandoned with the Lisbon Treaty, which contemplates the single legal personality for the Union, which led to the communitarisation of the treatment of the issue concerning Justice and Internal Affairs.

[2] Regarding this matter, MARIA ÁNGELES PÉREZ MARÍN, *La Lucha Contra La Criminalidad en La Unión Europea – El Camino Hacia Una Jurisdicción Penal Común*, Atelier, 2013, p. 43, which refers, with particular interest that, "*The States, on an individual basis, could not face the involving reality and, ultimately, the citizens' rights to freedom, security and justice – the referred Europe of citizens – could be affected*" (loose translation).

and justice area (article 67 of the Treaty on the Functioning of the European Union, hereinafter "TFEU").

From the Maastricht Treaty, through the revolutionary Tampere European Council, to the Lisbon Treaty, it is possible to unveil a gradual consolidation of a set of principles that allow a dynamic, strengthened and operational judicial cooperation in criminal matters. Indeed, the EU, aware that crime knows no nationalities or borders, waived some of their sovereignty for a common project. Only this amendment allowed the further adoption of relevant legislation within judicial cooperation in criminal matters[3], such as Council Framework Decision 2009/829/JHA, of October 23rd, 2009, on the application, between Member States of the EU, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (hereinafter "ESO").

In this respect, during the internal transposition phase of ESO, the Green Paper on the application of EU criminal legislation was published, which intended to explain and launch relevant issues in the public discussion regarding their adoption and implementation, in order to strengthen the mutual trust in the European judicial area and where the Commission encouraged the use of measures as an alternative to provisional detention, exemplifying the possibility of applying electronic surveillance in order to ensure the correct and effective implementation of ESO and the reduction of provisional detention periods[4].

After more than four years since the transposition of ESO's provisions, Belgium and Ireland have not yet done so[5]. Therefore, in their relations with those States, the Member States that transposed ESO cannot benefit from the respective provisions in matters of cooperation. As referred to in the Commission's Report on the implementation by the Member States of ESO, "*the mutual recognition principle, which constitutes the cornerstone of the European judicial area, requires a mutual transposition and it cannot operate if the instruments are not properly applied in both Member States. Consequently, in case of cooperation with a Member State that did not proceed with the transposition in the established deadline, the Member States that have done so should continue to implement the correspondent conventions of the European Council whenever they transfer detainees or condemnations of EU for another Member States*"[6].

In this cooperation context, we shall recall the principles and fundamental rights shared by the EU Member States including those contained in the Charter of Fundamental Rights of the

[3] In this respect, the following Framework Decisions shall be mentioned: Council Framework Decision 2002/584/JHA, of 13/06/2002, which approves the European arrest warrant; Council Framework Decision 2008/909/JHA, of 27/11/2008, regarding the application of the mutual recognition principle to the judgments in criminal matters that impose custodial sentences or measures involving deprivation of liberty for the enforcement purposes of those judgments in the EU; Council Framework Decision 2008/947/JHA, of 17/11/2008, regarding the application of the mutual recognition principle to the judgments and decisions related to the probation for monitoring purposes of the surveillance measures and alternative sanctions, also known as "*Probation*".

[4] European Commission, Green Paper on the application of EU criminal law, 2011, p. 8.

[5] https://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat.aspx?CategoryId=39.

[6] Considering this situation, there are two different solutions: (i) the interpretation in conformity with EU law of the Constitution or the legal provision that contradicts ESO, leading to its non-application; or (ii) an infringement procedure for the States that have not transposed the Decision in accordance with article 258 of TFEU.

European Union ("Charter") and the European Convention on Human Rights ("ECHR"). ESO assumes itself as a fundamental instrument for the protection of these rights, namely the dignity of the human person (article 1 of the Charter), the right to liberty and security (article 6 of the Charter and article 5 of the ECHR), the right to be presumed innocent (article 48, par. 1 of the Charter) and the principles of equality and non-discrimination (articles 20 and 21 of the Charter and articles 14 and 1 of Protocol 12 to the ECHR).

Thus, considering the importance of the matter and its recent implementation by the Member States, we propose an analysis of ESO, in its various features, hoping that this results in an effective dialogue.

§2. From discrimination: The period prior to ESO's approval

In the period prior to ESO's approval, there were no regulatory instruments providing for international mutual recognition of decisions on supervision measures matter and allowing the enforcement of measures applied in a State other than the State which ordered them.

This raised a several difficulties when a crime committed by a person resident in another State was involved, considering that no measure would have any effect in the State of his/her residence. It is easily understood that it would not make sense to apply a measure of weekly appearance before a Portuguese criminal police entity to a defendant if he/she has his/her residence in Bulgaria. On the other hand, and considering the non-recognition of decisions in this matter, that obligation could never be complied with by a Bulgarian body, since it would not recognize any validity to that obligation.

Moreover, it would make little sense to forbid the defendant from leaving the country where he had committed the criminal offense because he/she would not have any connection with that country, as residence or a job. So, that situation would leave the defendant in an excessively burdensome situation and would increase the likelihood of default of the obligation.

As a result, in these situations, there were only two possible solutions to be considered by judicial bodies: the provisional detention of the non-resident or the total lack of monitoring of his/her movements.

Considering this, any situation that represented any sort of seriousness and that could not be settled with the total lack of monitoring of movements, would lead to the defendant's provisional detention, exclusively based on the fact that the defendant had his/her residence in another Member State.

This measure would be disproportional and would represent a discrimination based on the residence and eventually on the nationality of the defendant[7], which would constitute an inadmissible solution according to the EU law[8].

Non-discrimination is, since the beginning, an EU concern. In effect, the EU construction is based on the ever-closer cooperation between the Member States, which, in addition to the need of deepening the integration, has drawn the attention to the need of taking into consideration the prohibition of discrimination, namely, based on the residence and nationality, seeking a progressive equal treatment of all European citizens, regardless of their nationality and domicile.

On the other hand, the EU was founded on the respect for democracy and the principle of the Rule of Law, based on the values of human dignity, freedom, equality, solidarity, democratic pluralism and in the deep respect for human rights. Hence it is possible to find references to the prohibition of discrimination in different legislative latitudes, in particular in the Charter[9/10] and in the ECHR[11].

One of the most important rights granted to European citizens is the right to freely move within the territory of the Member States (article 21 TFEU[12]). This right has been extended throughout the process of European integration, considering that initially only individuals who owned the nationality of one Member State but provided an economic activity in another Member State could freely travel within the European area. However, with the introduction of European citizenship status, the right of free movement became more widely understood, including the right to enter, leave and remain freely in any Member State, as well as the right to be treated on a non-discriminatory basis when compared to a citizen of another Member State. This means that European citizens can challenge the provisions of the State of their nationality which discriminate them due to the fact that they have been circulating in Europe.

[7] According to ECtHR's case law, to discriminate is to treat differently, except objective and reasonable justification. In this regard, please see judgments *Willis against United Kingdom,* of 06 of November of 2002 and *Okpisz against Germany*, of 25 of October of 2005.

[8] The Charter is legally binding pursuant to article 6, paragraph 1 of TEU, in the wording resulting from the Lisbon Treaty.

[9] Article 21 of Charter establishes the following: "*1. Any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. 2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited".*

[10] Article 21 of Charter establishes the following: "*1. Any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. 2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited".*

[11] According to article 2, paragraph 1, "*Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*".

[12] This provision produces direct effect, which has been defended by CJ in Judgment Baumbast, of 17.09.2002, proceedings C-413/99.

In these terms, the Court has already ruled in several judgments, such as, Tas-Hagen and Tas[13] and Morgan[14]/[15], Dominic Wolzenburg[16] and Collins[17].
The right to circulate in the EU area is nowadays granted not only to the European employees (article 45 of TFEU) and their family, but also to any European citizen, according to articles 20 and 21 of TFEU.

In this context, the introduction of the concept of European citizenship[18] represented a fundamental step in the European integration process. The main purpose was the approach of the peoples of Europe, the strengthening of the national citizens' rights and the contribution to the EU legitimacy "[t]*he European citizenship (…) and the creative and integrative case-law of the Court of Justice have contributed decisively to deepen, expand and crystallize the rights of the nationals of the Member States in the European area, being the binding element the prohibition of discrimination of European citizens based on their nationality*"[19].

If, during a first moment, the non-discrimination principle aroused based on the economic objectives of integration, *i.e.*, the creation of a common market and free competition, being a fundamental instrument of its completion[20], such principle became autonomous and based on the dignity of the human person[21].

As referred by MARIA LUÍSA DUARTE "*when exercising the rights of free movement, the citizen of a Member State benefits of the community protection that ensures him/her the right to a legal non-discriminatory treatment, both in the Member State of the residence and in the Member State of the nationality*"[22].

In the densification of the outlines of the non-discrimination principle the CJ[23] has been particularly relevant, seeking to provide operational criteria capable of giving greater

[13] CJ Judgment of 26.10.2006, proceedings C-192/05.
[14] CJ Judgment of 23.10.2007, proceedings C-11/06 and C-12/06.
[15] In this respect, please refer to SOFIA OLIVEIRA PAIS, «Todos os cidadãos da União Europeia têm direito de circular e residir no território dos Estados-Membros, mas uns têm mais direitos do que outros…», *Scientia Ivridica,*p. 477.
[16] CJ Judgment of 06.10.2009, proceedings C- 123/08.
[17] CJ Judgment of 23.03.2004, proceedings C- 138/02.
[18] The concept was created with the Amsterdam Treaty of 1992. The idea had already been announced by Tindemans in 1975 as a mechanism to strengthen the rights of the nationals of the Member States and, at the same time, to approximate peoples of Europe, creating a sense of belonging to an EU arising from a common identity.
[19] CONSTANÇA URBANO DE SOUSA, «Discriminação e Nacionalidade», *Revista de Direito Público*, no. 9, 2013, p. 8.
[20] Initially, the EU had merely economic purposes, which were not consistent with the existence of discrimination based on nationality, since the completion of the common market ultimately depended on the free movement of goods, persons, services, capital, without distinction as to the nationality of the person or the origin of the goods or capital.
[21] ANA GUERRA MARTINS, *A igualdade…ob. cit.,* p. 24.
[22] MARIA LUÍSA DUARTE, «O Estatuto de cidadão da união e a (não) discriminação em razão da orientação sexual», AAVV *Estudos em Memória do Professor Doutor António Marques dos Santos* (coord. JORGE MIRANDA et. al.), Coimbra: Almedina, p. 637.
[23] Judgment of the CJ, Case C-6/64, Costa v. ENEL in the sense that "*The provisions of Article 37 (2) of the EEC Treaty have as their object the prohibition of any new measure contrary to the principles of Article 37 (1), that is any measure having as its object or effect a new discrimination between nationals of Member States regarding the conditions in which goods are procured and marketed, by means of monopolies or bodies which must, first, have as their object transactions regarding a commercial product capable of being the subject of competition and trade between Member States, and secondly must play an effective part in such trade*". Also in a Judgment of the CJ,

practicality to the principle, arguing for the need for double control. Firstly, by comparing the situations under discussion. Secondly, through the analysis of possible grounds for the difference in treatment[24].

By applying to the defendant the measure of provisional detention, given the existence of a danger of escape merely based on his/her residence in another Member State, the courts breach the non-discrimination principle, firstly with grounds on the residence and, secondly, with grounds on nationality, what is legally inadmissible and ends up reducing in an unacceptable way the scope of the right of free movement.

According to recital 5, ESO sought to remove discrimination based on the criterion of residence[25]. In any case, we cannot overlook the fact that most of the times the non-resident is also a non-national citizen of the State in which the criminal proceedings are taking place, and therefore these issues – residence and nationality – are interconnected.

The ESO was approved within this context.

§3. To equality: ESO

§3.1. ESO's subject matter

Eight years after ESO's adoption, it is certain that the dogmatic analysis and the assessment by national and European case law on this subject still leave much to be desired, which is in counter-cycle with the relevance that it has in the fight against transnational criminal offences and the need for non-discriminatory and proportional treatment of persons suspect of having committed a crime in a State different from the State of their habitual residence.

ESO allows the implementation of European supervision measures that can be configured as an enforcement decision rendered by a certain authority of a Member State, in accordance with its national law, against a suspect who has his/her residence in another Member State, which will be supervised by the relevant authority of the defendant's State of residence or by another appointed by the least, since there is a prior consent of the national authority[26/27].

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dated of 06.10.2009, on the Case C-123/08, on the European Arrest Warrant of Dominic Wolzenburg it is referred that "*with regard to whether a requirement for residence for a continuous period of five years, as laid down in the national legislation at issue in the main proceedings, is contrary to the principle of non-discrimination based on nationality, it must be borne in mind that that principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see, inter alia, Case C‑303/05 Advocaten voor de Wereld [2007] ECR I‑3633, paragraph 56)*".

[24] MARIANA CANOTILHO, «Brevíssimo apontamentos sobre a não discriminação do Direito da União Europeia», *Julgar* no. 14, Ano 2011, p. 105.

[25] Therefore the Council expressly admits that the principle of non-discrimination with grounds on the residence is being breached whenever a judgment applying a coercive measure is rendered solely laid on the fact of the residence of the person of interest.

[26] ADRIANO MAFFEO, «La Decisione Quadro N.º 2009/829/GAI: Il principio del mutuo riconoscimento applicato alle decisioni sulle misure alternative alla detenzione cautelare», *Diritto comunitario e degli scambi internazionali*, Vol. 1/2010, p. 105 e ss.

With ESO's adoption it was intended to establish the features of a legal regulation, common to all the Member States, and based on the principles related to the recognition of decisions in criminal matters by other States, without delay and without the intermediation of excessive formalities. This allows the implementation of coercive measures in criminal proceedings to a resident in another Member State, with the supervision of that measure and, in case of non-compliance of the measure applied, the surrender of the suspect under the European Arrest Warrant[28] (hereinafter "EAW"), to the Issuing State without the need to comply with special formalities[29].

The recognition refers to a decision on supervision measures, which are understood as the ones undertaken in the course of criminal proceedings by a competent authority of the Issuing State (article 4, par. a)). However, it is not required that it be a judicial decision, but rather a decision issued by the body which is internally competent to do so. Thus, the recognition may possibly have on its basis judgments issued by the judge, the Public Prosecutor's Office or the Police[30].

In article 8[31], the control measures that can be applied and, therefore, subject to supervision by the Executing State are defined. The State may also define other measures that it is in a position to implement, giving as an example, the prohibition to carry out certain activities related to the alleged offenses committed, which may include a particular profession or professional sector; the inhibition of driving a vehicle; the obligation to deposit a certain sum of money or provide another type of guarantee, which can be done in a specified number of instalments or immediately in a single instalment; the obligation to undergo medical-therapeutic treatment or treatment of dependency and the obligation to avoid contact with certain objects related to the alleged offenses.

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[27] Article 1 of ESO defines its subject matter and refers that these control measures are applied "*as an alternative to provisional detention*". This wording raises a relevant issue relating to the possibility of applying control measures within ESO only as an alternative to provisional detention. In this regard, we understand that it cannot be interpreted in this way. In effect, such an interpretation would excessively compress the ESO's scope, which would become limited to the implementation of a control measure exclusively as an alternative to provisional detention. A similar issue could be raised in regard to Law 36/2015, of 4 of May, whose wording is similar to the Framework Decision. Indeed, the issue has already been raised by the Superior Council for the Public Prosecution, in the opinion issued in respect of the draft law 272/XII (Please refer to Opinion of the Superior Council for the Public Prosecution issued in respect of the draft law 272/XII /4-ª (Gov), p. 3).

[28] As we see below, the surrender procedure was discussed within other parameters, which were not expressed in the Framework Decision.

[29] In these terms, please refer to JORGE COSTA, «Decisão Quadro 2009/829/JAI, do Conselho, de 23 de outubro de 2009, relativa à aplicação, entre os estados-membros da União Europeia, do princípio do reconhecimento mútuo às decisões sobre medidas de controlo, em alternativa à prisão preventiva», *Julgar*, No. 7, Ano 2012, pp. 177 and 178.

[30] In the Portuguese legal system, the authority for the implementation of supervision measures is the examining judge, understood as the judge of rights, freedoms and guarantees (with the exception of the statement of identity and residence that can be determined by the Public Prosecutor's Office or by the Police). Nevertheless, when Portugal is the Executing State it cannot refuse to recognize a decision in which the coercive measure has been applied by the Police.

[31] Pursuant to article 8 of ESO it shall apply to the following supervision measures: (a) an obligation for the person to inform the competent authority in the Executing State of any change of residence, in particular for the purpose of receiving a summons to attend a hearing or a trial in the course of criminal proceedings; (b) an obligation not to enter certain localities, places or defined areas in the issuing or Executing State; (c) an obligation to remain at a specified place, where applicable during specified times; (d) an obligation containing limitations on leaving the territory of the Executing State; (e) an obligation to report at specified times to a specific authority; (f) an obligation to avoid contact with specific persons in relation with the offence(s) allegedly committed.

As for us, it is worth mentioning the supervision measure "*obligation to remain at a specified place during specified times*". Once recital 11 of ESO provides for the possibility of electronic surveillance, we believe that a very useful content that can be extracted, when combined with the measure of article 8, par. 1, subpar. c) is that the ESO legally foresees the possibility of applying the supervision measure of house arrest. Such a conclusion is wholly compatible with the principle of preferential application of house arrest as an alternative to provisional detention, and also with ESO's objectives.

Such measures may be adapted by the Executing State, but never more severely than initially determined. The Issuing State is thus able to, in the event of disagreement with the adaptation, withdraw the certificate as long as monitoring in the Executing State has not yet begun (article 13). Furthermore, the Executing State shall, without delay, inform the Issuing State by any means which leaves a written record, the maximum length of time during which the supervision measures can be monitored in the Executing State, in case the law of the Executing State provides such a maximum (article 20, par. 2, subpar. b)). This is due to the fact that various national legal systems provide for different time periods for maintaining supervision measures. These time periods may be longer or shorter and there are even cases where maximum time limits have not been set, and in the absence of legislative harmonization, the Executing State undertakes the obligation to do so during the period legally defined in its legal framework, and only during that time period. This shall be without prejudice to the possibility of extension of the monitoring of the measure, following a request by the Issuing State, which shall be assessed by the Executing State in accordance with its national law (article 17).

According to article 9, par. 1 of ESO a decision on supervision measures may be forwarded to the competent authority of the Member State in which the person is lawfully and ordinarily residing, in cases where the person, having been informed about the measures concerned, consents to return to that State. Pursuant to article 9, par.2, the defendant may request the enforcement of control measures in a State in which he/she is not legally and habitually resident, provided that the same State consents to the defendant. It usually is required that some degree of connection with the Executing State exists, in order to guarantee that it will be able to fulfill the supervision objectives that it proposes to and also because it will bear the inherent costs (article 25). At the same time, such a requirement seeks to ensure that the respondent does not have the overriding objective of creating difficulties in the execution of the measure, failing to comply with it or, in the future, not attending judgment.

Finally, the law applicable to the supervision of measures is that of the Executing State, but it is the Issuing State who undertakes the subsequent decisions, including renewal, review and withdrawal of the decision on supervision measures, modification of measures and issuance of arrest warrants or any other enforceable judicial decision having the same effect (articles 16 and 18).

§3.2. Objectives of international supervision measures

ESO was adopted in a context of international judicial cooperation and under which a deepening of the legislative integration of the Member States is sought. Its study and analysis cannot be separated from these realities, because it is in this light that the legislative solutions that emerge thereof are understood and justified.

ESO's approval has met a need to protect the defendant's rights while ensuring a high level of criminal justice and protection of civil society as a whole. In fact, through ESO it became possible to carry out the transnational control of the movements of a defendant who is suspected of having committed a crime in a State other than that of his/her residence, without the latter having to be constrained to the borders of that State.

It is, if we understand correctly, this symbiosis of objectives - which can be perceived as antagonistic and irreconcilable - that lead ARANGUENA FANEGO to state that ESO is "*a paradigmatic example of the fact that freedom and security can be harmoniously treated in the same European instrument, since it allows at the same time to reinforce the status of the defendant and to provide adequate protection to society with special consideration, naturally for the victim*"[32].

At the same time, and in accordance with article 2, par. 1, subpar. b), ESO promotes the use, in the course of criminal proceedings, of non-custodial measures for persons who are not resident in the Member State where the proceedings take place protecting, as it did not happen until then, the freedom of movement of a defendant and his/hers presumption of innocence.

More significantly, ESO intends to ensure a reduction in the application of provisional detention to non-residents, simply as a consequence of this condition. ESO sought to strengthen the rights of persons subject to criminal proceedings, including the right to freedom and the presumption of innocence, by applying non-custodial supervision measures as an alternative to provisional detention whilst a defendant is awaiting the delivery of a judgment in criminal proceedings.

Given the importance of this question in (the refusal to) the application of ESO, it seems to us that it deserves autonomous treatment.

[32] CORAL ARANGÜENA FANEGO, «Reconocimiento mutuo de resoluciones sobre medidas (de vigilancia) alternativas a la prisión provisional», p. 2.

§3.3. The non-resident: Between the risk of escape and the compliance of ESO

The legitimation of a freedom-depriving precautionary measures imposed on an individual who is presumed innocent has always raised questions about the borders that the Criminal Law can dare to overturn. However, it is a well-known fact that the principle of presumption of innocence does not have the greatest weight when choosing a coercive measure, when compared to the precautionary needs specific to criminal procedures.
Thus, courts may apply custodial measures when they consider that any of the dangers that may jeopardize the purposes of criminal proceedings are detected and that deprivation of liberty is the only way to protect them.

In Portugal, the decisions of the High Courts have forwarded a set of circumstances in relation to which the suspect is found to be at risk of escape and that, consequently, justify provisional detention, and which relate to the characterization of the defendant as an individual of a foreign nationality or resident abroad and who has temporarily moved to another Member State and is suspected of committing a crime thereof.

In this regard, it is illustrative to refer the Judgment of a Portuguese Court of Appeal dated of February 4th, 2014[33], which decided to uphold provisional detention, taking into account that the defendant did not have a current connection with Portugal since he resided and worked abroad, he was not a national citizen, and also given the fact that the case was linked to a transnational and transcontinental criminal activity. For those reasons the Portuguese court considered that there was no certainty that, if in freedom, the defendant would remain at the disposal of criminal proceedings, appearing before the court whenever necessary. Such suspicion was grounded, essentially on facts related to the foreign nationality of the defendant and on the fact that he had no domicile in Portugal.

The question that must be placed upon the judgments of the Portuguese courts is if the judgment would be the same if the court was before someone residing in Portugal? Has there been discrimination solely based on the residence of the person breaching the Charter and ECHR? Does this issue not conflict with the right of European citizens to freedom of movement[34]?

It is precisely in response to these issues that ESO Recital 5 expressly states that *"As regards the detention of persons subject to criminal proceedings, there is a risk of different treatment between those who are resident in the trial state and those who are not: a non-resident risks being remanded in custody pending trial even where, in similar circumstances, a resident would*

[33] Judgment of the Court of Appeal of Evora, dated from 04.02.2014, in the proceeding 68/13.0JELSB-A.E1, available at http://www.dgsi.pt/jtre.nsf/134973db04f39bf2802579bf005f080b/2a15f597e646641580257de10056fd50?OpenDocument.

[34] In the judgment of CJ, Case C-123/08, Dominic Wolzenburg, the Court already stated that, "*in this case, it must be held that a situation such as that of Mr. Wolzenburg is covered by the right of citizens of the Union to move and reside freely in the Member States and therefore falls within the scope of the EC Treaty. By taking up residence in the Netherlands, Mr. Wolzenburg exercised the right conferred by Article 18(1) EC on every citizen of the Union to move and reside freely within the territory of a Member State other than that of which he is a national*".

not. In a common European area of justice without internal borders, it is necessary to take action to ensure that a person subject to criminal proceedings who is not resident in the trial state is not treated any differently from a person subject to criminal proceedings who is so resident".

The right to an equal treatment may be subject to certain exceptions whenever justified by legitimate reasons. In this respect the CJ has already held[35] that such conditioning can be justified, not breaching the principle of non-discrimination, on the basis of objective considerations, independent of the nationality of the persons concerned and inasmuch as they are proportionate to the objective pursued by national law.

In this light, in the Case Wolzenburg, the CJ held that it is not discriminatory to require a non-national which resides in a Member State for about a year, for the purpose of refusing to execute an EAW, that he/she has been resident in that country for at least 5 years. The Court held that the residence requirement for an uninterrupted period of five years in respect of the execution of the EAW – as provided for under Dutch national legislation – is not an excessive requirement, taking into account, namely the requirements to meet the needs of integration of non-nationals in the Member State of enforcement.

Carrying the interpretation of the CJ to the situations of provisional detention on the grounds of lack of connection of the concerned person with the country in which the criminal proceeding is pending, due to his/her non-residence, as a basis for the assumption of the risk of escape, we are forced to conclude that there are no objective and proportionate reasons for such a coercive measure.

Thus, since there is an European area of freedom of movement and there is a link between criminal systems for the control of persons subject to criminal proceedings, the idea that there are objective and proportionate reasons at this level for restricting the rights of free movement of European citizens cannot be admitted.

Moreover, the application of a provisional detention on grounds of non-residence also constitutes an intolerable breach of the principle of non-discrimination. ESO, by introducing cross-border supervision measures on persons subject to criminal proceedings, objectively withdraws the need to impose a deprivation of liberty on account of the risk of escape of a non-resident, reason for which there cannot be no proportional and reasonable limitation to the principles of free movement of persons and non-discrimination.

In this regard the Opinion of the Avocate General in the Case Heinz Huber v Bundesrepublik Deutschland is of the utmost relevance: "*the starting point in discrimination cases should be that Union citizens are entitled to the same treatment as nationals subject to express exceptions. (14) The prohibition of discrimination on the basis of nationality is no longer merely an instrument at the service of freedom of movement; it is at the heart of the concept of*

[35] The CJ in the Case C-138/02, Collins, the Court has considered justified a situation in which the national legislation subjected the awarding of benefits to job applicants depending on their residence.

European citizenship and of the extent to which the latter imposes on Member States the obligation to treat Union citizens as national citizens. Though the Union does not aim to substitute a 'European people' for the national peoples, it does require its Member States no longer to think and act only in terms of the best interests of their nationals but also, in so far as possible, in terms of the interests of all EU citizens"[36].

Thus, by being required a connection of the person concerned with the country in which he/she is suspect of having committed a crime, then he/she is being objectively discriminated with grounds on residence and, indirectly, with grounds on nationality, once the vast majority of the non-residents are foreigners, being said difference in treatment disproportionate in light of the means of cross-border monitoring that ESO has granted the Member States.

By requiring the existence of a connection through the defendant's residence to the country where he/she is charged with a crime, he/she is being objectively a target of a direct discrimination on the basis of the residence of the European citizen and indirectly on the grounds of nationality, once the vast majority of non-residents are foreign nationals.

In fact, the principle of non-discrimination on the grounds of residence and nationality establishes that all necessary measures should be undertaken to promote the blurring of situations of inequality between citizens. It was in this sense that ESO provided the Member States with means of monitoring the defendant in the State he/she resides in or is a national of, thereby avoiding discrimination on grounds of residence and nationality in the application of coercive measures, as its main objective, and as a secondary aim, the verification of the non-discrimination according to nationality for the reasons already explained.

Therefore, it is precisely, in this field that ESO reinforces the interests of individuals subject to criminal proceedings by providing for a set of supervision measures to be applied in another Member State, thereby strengthening the right to freedom and the presumption of innocence, and promoting, where appropriate, the use of non-custodial measures as an alternative to provisional detention.

As it is stated by GRAÇA FONSECA "*The greater probability of applying provisional detention to foreign defendants has at its origin an interaction between certain social and economic circumstances with the legal and jurisdictional criteria for the application of provisional detention. Circumstances such as less work and residential stability or lack of family support structure, more frequent in immigration communities, especially the more recent ones, interact with the legal requirement of the risk of escape, central in criminal legislation of most countries, in its application it tends to discriminate against foreigners, even those residing in the host countries*"[37].

[36] Opinion of Advocate General Poiares Maduro, delivered on 3 April 2008, Case C‑524/06, Heinz Huber v Bundesrepublik Deutschland, paragraph 18.
[37] Please refer to GRAÇA FONSECA, *Percursos Estrangeiros no Sistema de Justiça Penal, Observatório da Imigração*, Novembre 2010.

In addition to avoiding discrimination on grounds of residence and nationality, the possibility of carrying out a supervision measure in the Member State where the defendant is a national or a resident will, primarily, enable him to continue his/hers daily social, family and professional life while awaiting for the outcome of the criminal proceedings. Problems will be avoided in the employability of the defendant and consequently negative effects of loss of income for the defendant and his / her household. Furthermore, it will also prevent the defendant from suffering a rupture in his family and other social ties. Consequently, it will be possible to mitigate the negative effects that a criminal proceeding has on an individual, making possible the maintenance of their social, family, economic and cultural stability. On the other hand, there are also advantages to the Issuing State by reducing the costs associated with subjecting an individual to a custodial measure when there are no other factors that require intervention.

Obviously, this only means that the application of an alternative measure to provisional detention should only be determined in cases where subjecting the defendant to the most serious measure is solely based on the fact that in the case in question there is a concrete danger of escape, arising from the fact that he/she is a citizen not resident in the State where the criminal proceeding is pending. As stated in article 2, par. 2 of ESO, "*This Framework Decision does not confer any right on a person to the use, in the course of criminal proceedings, of a non-custodial measure as an alternative to custody*".

In view of the foregoing, it must be concluded that, with the adoption of ESO, it is no longer possible to invoke the risk of the person escaping because of his or her residence as a criteria justifying the application of provisional detention as such a finding would be contrary to the principle of non-discrimination, since the only element which would allow to derogate the principle of non-discrimination would be the lack of an effective connection with the Member State where the criminal proceedings are pending, in particular the absence of residence. Nevertheless, this element is now safeguarded through the existence of cross-border supervision measures - ESO and EAW - which make it in any circumstance, disproportionate and contrary to European Union law, the application of provisional detention with the sole grounds lying on danger of escape, only resulting from the lack of connection of the defendant with the territory of that State.

Moreover, the adoption of a provisional detention, which is not based on a specific danger of escape, but on a purely abstract criteria based on the person's non-residence, constitutes an unlawful deprivation of liberty under article 5 of the ECHR.

§4. Grounds for non-recognition

The Executing State may refuse to recognise the decision on supervision measures, with the grounds established in article 15. Among these hypotheses, we will not fail to indicate some, such as those listed in subparagraph c), d), g) and h) of paragraph 1, of the aforementioned legal provision.

Pursuant to article 15, par. 1, subpar. c, the Executing State may refuse to recognize a measure where this would be contrary to the *ne bis in idem* principle, which is also assumed at the EU level[38], and as it is stated in the judgment of the CJ Zoran Spasic, in case C‑129/14 PPU, "*The source of the ne bis in idem principle at the transnational level is the risk that, if an offence relates in some way to several legal systems, each will assert its own jurisdiction, thus creating the possibility of cumulation of state punishment*"[39].

The situation where the reported facts are not a crime in the Executing State is also a ground for refusal, whenever the latter has stated that the implementation of the measure depends on the concrete verification of the principle of double criminality (articles 15, par. 1, subpar. d) and 14).

The verification of immunities in the Executing State may prevent it from monitoring supervision measures, as well as when the person cannot, by reason of his age, be held criminally responsible (article 15, par. 1, subpar. f) and g)).

Article 15, par. 1, subpar. h) defines as a ground for refusal the situation where, in the event of a breach of the measure by the person, the State has to refuse to surrender the person concerned under the provisions of the EAW, notwithstanding being enabled to inform the Issuing State of its willingness to recognize and monitor the supervision measures applied (article 15, par. 3). That situation does not in fact constitute a refusal to recognize the decision implementing the supervision measure, but falls within the scope of the failure to comply with the measure and its consequences.

[38] Article 4, of Protocol no 7 of ECRH and article 50 of the CFREU.
[39] View of Advocate General Jääskinen, delivered on 2 May 2014, Case C‑129/14 PPU, Zoran Spasic, paragraph 35.

§5. The breach and review of supervision measures

The effectiveness of the model advocated by ESO depends on the existence of effective supervision by the Executing State of the control measure that has been applied. To this end, it is essential to have a permanently open channel of communication between Central Authorities so that the objectives of ESO implementation are not jeopardized by the negligence of Issuing and Executing States. In this sense, pursuant to article 19, par. 3 of ESO, the Executing State shall immediately notify the competent authority of the Issuing State of any breach of a supervision measure and of any other finding which could result in the renewal, review or withdrawal of the decision on supervision measures; the Modification of supervision measures; Or the issuance of an arrest warrant or any other enforceable judicial decision with the same effects.

Thus, the Issuing State may act immediately through a possible change of supervision measures, through its modification, reinforcement of supervision, or in more serious cases, and subsidiarily, by issuing an EWA for immediate and coercive return of the suspect to that State, if provisional detention is deemed necessary. Moreover, ESO reinforced this last possibility because it provides that under article 21, the Issuing State may issue an arrest warrant, ordering the surrender of the person to that country, regardless of the requirements of that warrant regarding the sanction. In fact, article 2, par. 1 of Framework Decision 2002/584/JHA on the EAW states that it may only be issued for acts punishable by the law of the Issuing State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.

Therefore ESO envisages to reinforce the response to a breach by the suspect of the supervision measure imposed as an alternative to provisional detention, allowing international means to be enforced for the immediate replacement of the suspect in the jurisdiction of the Issuing State, in order to ensure the appearance of the person on trial.

It is therefore clear that this provision, by mitigating the specific requirements of the EAW, is clearly intended to demonstrate to Member States that non-compliance with international supervision measures is sanctioned and, thus, acts as a positive reinforcement of the system with regard to the applicability of this legal framework.

Having said that, if ESO has had a residual practical application, this is certainly not due to the vast possibilities for coordinated action between Member States' courts, since it has provided them with a system of cooperation capable of being effective for implementing interstate supervision measures.

On the other hand, the practical failure of ESO is due to lack of knowledge of ESO itself and its virtues, and to a distancing from national courts of international instruments and consequent lack of mutual trust between judicial systems. The words of BRUNO MIN in this regard are worth mentioning: "[t]*he failure of the ESO so far can be blamed on the fact that, as demonstrated by the cases of injustice caused by the misuse of the European Arrest Warrant, the reliance on*

mutual trust between EU Member States is often misplaced and misguided. The level of confidence required by courts to give up control over the accused under the supervision of another Member State simply does not seem to be in place"[40].

National magistrates as the first instance applying EU law have a duty to use the instruments of criminal cooperation at their disposal to promote a uniform application of the law. In fact, "[a]*ssuming the member states implement the ESO in national law, magistrates and judges throughout the EU will then have an important role to play. The presumption in favour of liberty at common law and under the European Convention on Human Rights means careful consideration must be given to the use of an ESO in each individual case involving a defendant resident in another EU state*"[41].

§6. Conclusion

The evolution of European integration in criminal matters can only be fully achieved through the effectiveness of the principle of mutual recognition with the necessary and underlying legislative harmonization between States, both substantively and procedurally. "*The achievement of a functioning 'euro-bail' system will depend on the competent national authorities developing confidence in each others ability to ensure defendants attend trial. Since the ESO is a framework decision, the European Commission currently has no power to enforce it by bringing infringement proceedings. It is up to the member states to make it work*"[42].

Although the punitive power of the State has always been understood as its ultimate stronghold of sovereignty, reality has shown that matters relating to organized crime, terrorism and drug trafficking could only be addressed through the adoption of effective cooperation mechanisms in the fight against cross-border crime. Thus, it has been recognized the need to harmonize substantive and procedural criminal systems, not only in order to ensure that crime is dealt with, but also to protect the principle of non-discrimination between European citizens[43].

In fact, it would not be coherent that an area of freedom was established, with the recognition of an European citizenship, which proclaims (unjustified) non-discrimination between citizens with grounds on residence and nationality, and then allow those same European citizens to be treated differently, depending on having committed crimes in one or another Member State[44]. In fact, if we envisage to move towards a true Union of European Law, it will not be

[40] Please refer to Bruno Min, «The European Supervision Order for transfer of defendants: why hasn't it worked?» *in https://www.penalreform.org/blog/the-european-supervision-order-for-transfer-of-defendants/*

[41] Please refer to Alex Tinsley, "A missed opportunity", https://www.fairtrials.org/wp-content/uploads/European-Supervision-Order-Article.pdf.

[42] Please refer to Alex Tinsley, "A missed opportunity", https://www.fairtrials.org/wp-content/uploads/European-Supervision-Order-Article.pdf.

[43] Articles 18 and 20 TFEU.

[44] Ilias Anagnostopoulos, Era Forum, volume 15, 2014, "*The statistics in the Annexes of the Green Paper, as well as recent studies on pre-trial detention show that in some EU countries, detention before trial is not always used as an exceptional measure where no other alternative would be available, but also as a coercive measure or anticipated punishment against accused persons*.", p. 22.

comprehensible that a foreign citizen or a non-resident in a given country has different treatment with regard to nationals and residents.

Let us not forget, however, that Member States, although having similar value systems, do not share them in a totally harmonious and aligned way. In the case of Criminal Law, which seeks to protect legal interests considered essential to the community and which underlie its ethical foundation, the more we understand the difficulties of harmonization. While it is acknowledged that significant procedural steps have been taken in legislative approximation, through the enactment of several Framework Decisions referring to proof, protection of the accused and of the victim[45], it is certain that this integration has not yet reached the level of consolidation that is needed.

[45] Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, meanwhile substituted by the Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters; Council Framework Decision 2008/909/JHA, of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the EU; Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, also known as "Probation"; Council Framework Decision no. 2001/220/JHA, meanwhile substituted by the Directive 2012/29/EU, of the European Parliament and of the Council.

EUROPEAN SUPERVISION ORDER

- From discrimination to equality -

Carlos Rodrigues
Sara Maia
Emanuel Machado

Sofia, 12-4-2017

CENTRO DE ESTUDOS JUDICIÁRIOS

ejtn

Summary

- Crossborder criminality
- The international cooperation in criminal matters
- From discrimination: the period prior to ESO's approval
- To equality: ESO
- Conclusion

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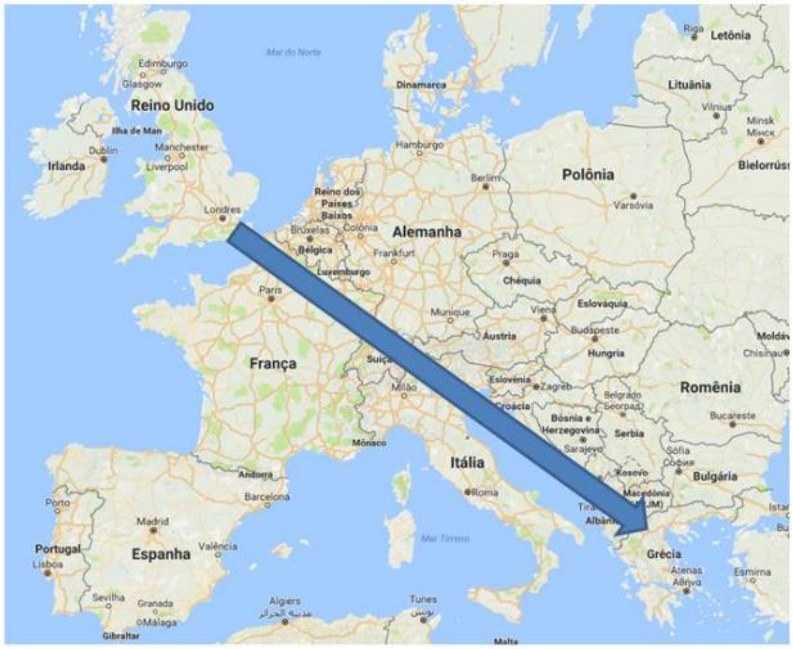
Crossborder Criminality



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Crossborder Criminality

- John is from UK. He travelled to Greece to spend his holidays.
- There he was, allegedly, involved in a brawl with local citizens, namely Nikos and Angelou.
- He was detained for questioning.
- He was applied provisional detention in order to prevent the risk of escaping to UK, because he was a foreign national and had no ties with Greece, thus ensuring he would attend trial .
- John and his family's lives were turned upside down. He was sacked from his job because he failed to show up to work.
- John lost his house once he failed to pay the amounts due to the bank loan.
- His family had no economic means to visit him in the Greek prison.

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Crossborder Criminality

Nevertheless…

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Crossborder Criminality

- Nikos and Angelou were detained for questioning.
- They were immediately released on bail.
- The judge considered that there was no risk of flight because Nikos and Angelou were local citizens, and they can attend the trial.

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Crossborder Criminality

After the trial...

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Crossborder Criminality

- Nikos, Angelou and John were sentenced with a two-year suspended prison sentence.

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The international cooperation in criminal matters

Council Framework Decision 2009/829/JHA of October 23rd, 2009 on the application between Member States of the EU, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention - ESO

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The international cooperation in criminal matters

- The principle of mutual recognition is built on the idea of reciprocal trust that should guide the relation between Member States, in order to an automatic and more direct acceptance of judicial decisions rendered in other countries.

- The principle of mutual recognition is considered the cornerstone of international criminal cooperation and it requires that, under an idea of trust between judicial systems, a foreign judgment issued by another Member State shall be recognized as if it was issued by a national entity.

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Prior to European Supervision Order

Prior to approval of ESO, there were no regulatory instruments providing for international mutual recognition of decisions on supervision measures matters and allowing the enforcement of supervision measures in a State other than the state which ordered them.

→ The provisional detention of non-resident

→ The total lack of monitoring of the suspect movements

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Prior to European Supervision Order

The lack of monitoring of the suspect would never assure the suspect presence in the trial.

The Judicial systems, in this cases, have the tendency to apply provisional detention to the non-resident, simply based on the fact that he has no conexion with that member-state, justifying in that way, the risk of flight.

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Prior to European Supervision Order

Non-discrimination is, since the beginning, an EU concern. In effect, the EU construction is based on the ever-closer cooperation between the Member States, which, in addition to the need of deepening the integration, has drawn the attention to the need of taking into consideration the prohibition of discrimination, namely, based on the residence and nationality, seeking a progressive equal treatment of all European citizens, regardless of their nationality and domicile.

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Prior to European Supervision Order

ECJ rulings in non-discrimination matter regarding the non-residence:

- Tas-Hagen and Tas – C192/05
- Dominic Wolzenburg – C123/08
- Collins – C138/02

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ejtn

Prior to European Supervision Order

By applying the defendant the measure of provisional detention, given the existence of a danger of escape merely based on his residence in another Member State, the courts breach the non-discrimination principle, with grounds on the residence what is legally inadmissible and ends up reducing in an unacceptable way the scope of the right of free movement.

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To equality: The European Supervision Order

This allows the implementation of coercive measures in criminal proceedings to a resident in another Member State, with the supervision of that measure and, in case of non-compliance of the measure applied, the surrender of the suspect under the European Arrest Warrant to the Issuing State without the need to comply with special formalities.

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To equality: The European Supervision Order

Control Measures - Article 8 -

- an obligation for the person to inform the competent authority in the executing State of any change of residence, in particular for the purpose of receiving a summons to attend a hearing or a trial in the course of criminal proceedings;
- an obligation not to enter certain localities, places or defined areas in the issuing or executing State;
- an obligation to remain at a specified place, where applicable during specified times;
- an obligation containing limitations on leaving the territory of the executing State;
- an obligation to report at specified times to a specific authority;
- an obligation to avoid contact with specific persons in relation with the offence(s) allegedly committed.

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To equality: The European Supervision Order

Control Measures - Article 8 -

- an obligation not to engage in specified activities in relation with the offence(s) allegedly committed, which may include involvement in a specified profession or field of employment;
- an obligation not to drive a vehicle;
- an obligation to deposit a certain sum of money or to give another type of guarantee, which may either be provided through a specified number of instalments or entirely at once;
- an obligation to undergo therapeutic treatment or treatment for addiction;
- an obligation to avoid contact with specific objects in relation with the offence(s) allegedly committed.

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To equality: The European Supervision Order
Objectives of international supervision measures
Eso's approval has met the need to protect the defendant's rights.
Promotes the use of non-custodial measures for persons who are not resident in the Member State where the proceedings take place
Protects the freedom of movement of a defendant and his presumption of innocence.
CENTRO DE ESTUDOS JUDICIÁRIOS
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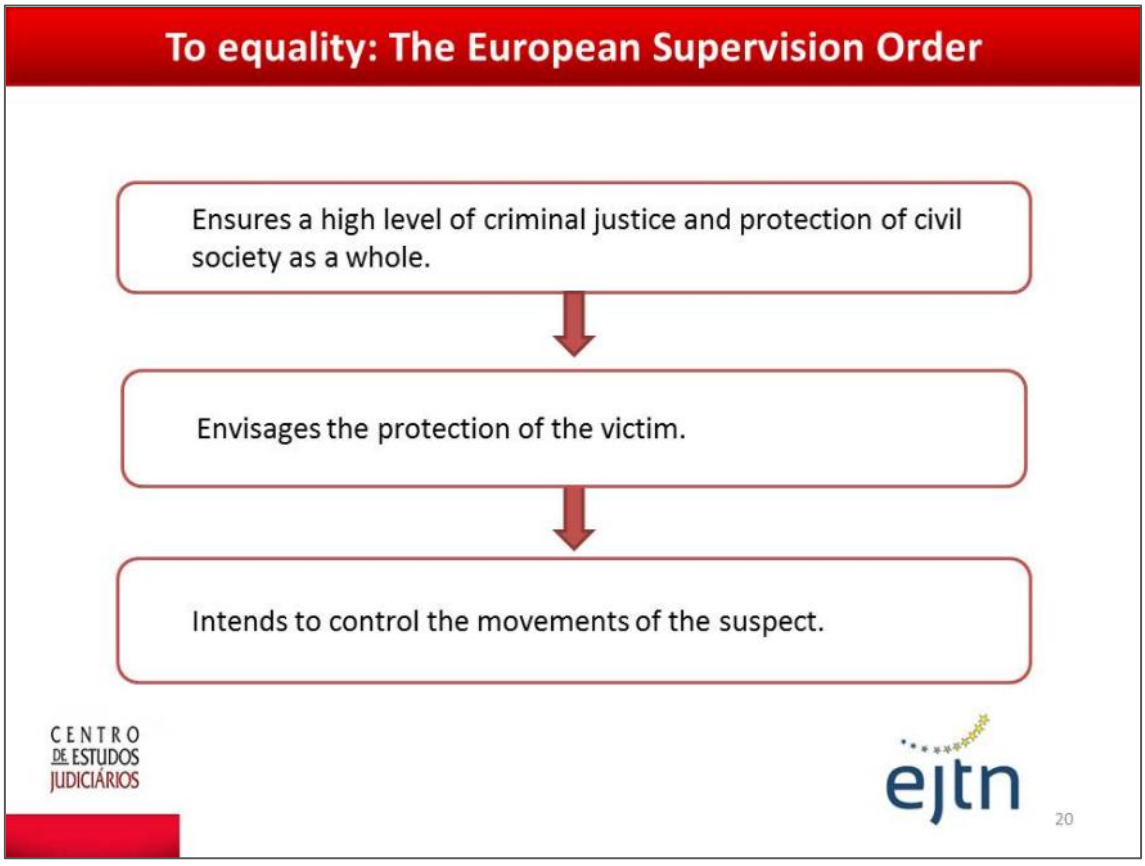
To equality: The European Supervision Order
Ensures a high level of criminal justice and protection of civil society as a whole.
Envisages the protection of the victim.
Intends to control the movements of the suspect.
CENTRO DE ESTUDOS JUDICIÁRIOS
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Applying the provisional detention based on the lack of connection of the concerned person with the country in which the criminal proceeding is pending, due to his non-residence, as a basis for the assumption of the risk of escape, is, objectively, discrimination, once there are no objective and proportionate reasons for such a coercive measure, from the introduction of the ESO in Member States legal order.

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To equality: The European Supervision Order

When balancing between the risk of flight which justifies the application of a provisional detention to non-residents and the resort to ESO the Court shall apply provisional detention whenever, and only when, it is grounded on **legitimate reasons** that are **not exclusively related to the non-residence of the suspect**.

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The right to an equal treatment may be subject to certain exceptions whenever justified by legitimate reasons.

When exist legitimate reasons?

According to CJ such conditioning can be justified:

(i) on the basis of objective considerations

(ii) independent of the nationality of the persons concerned and

(iii) inasmuch as they are proportionate to the objective pursued by national law.

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Conclusions

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Conclusions

The adoption of a provisional detention, which is not based on a specific danger of escape, but on a purely abstract criteria based on the person's non-residence, constitutes a violation of the principle of non discrimination.

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Obrigado

благодаря

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2.
Apresentação das Equipas

Accompanying Teacher

Maria Perquilhas

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APRESENTAÇÃO DA EQUIPA

Maria Perquilhas [1]

Tive o privilégio de acompanhar, enquanto docente orientadora, duas equipas de auditores de Justiça do 32.º Curso Normal de Formação de Magistrados do Centro de Estudos Judiciários (CEJ):

– A equipa Portugal 1, constituída por Andreia Marques Martins, Bruno Miguel Monteiro Alcarva, Débora Santa Maria Marques;

– E a equipa Portugal 2 por Ana Filipa Nordeste Redondo, Filipa Isabel Mendes de Andrade Valente, Maria João Pinto Esteves,.

Estas duas equipas concorreram à meia-final B – European Family law, que teve lugar em Bruxelas de 15 a 18 de Maio de 2017.

Cada uma das equipas apresentou o trabalho escrito e realizou a sua apresentação oral, tendo sido sujeitas a um pequeno interrogatório por parte de uma equipa sorteada para o efeito e depois questionada pelo júri.

Concorreram equipas de Áustria, Bulgária, França, Grécia, Itália e Republica Checa.

A equipa Portugal 1 apresentou o Tema "Children in Post-Modern Families: The Right of Children to Have Contact With Attachment Figures", e a equipa Portugal 2 apresentou o tema "Surrogacy - A Clash of Competing Rights".

Estes temas foram apresentados por escrito nos exatos termos editados neste e-book, tendo sido depois objeto de apresentação oral e discussão nos termos sobreditos.

O trabalho escrito da equipa Portugal 2 foi considerado o melhor trabalho escrito desta semi-final, tendo a equipa obtido um honroso e mais do que merecido 3º lugar.

A equipa Portugal 1 apresentou um tema inovador que ainda não é bem compreendido por aqueles que estudam e aplicam o Direito das Crianças. É igualmente um trabalho de excelência.

A exigência da competição leva a que muitos concorrentes de Escolas membros da EJTN dediquem grande parte do ano de trabalho, na preparação do Tema, elaboração do trabalho escrito e encenação da apresentação oral.

[1] Juíza de Direito, Docente do CEJ.

Os trabalhos devem apresentar situações que envolvam o direito comunitário, como aliás o nome da semi-final indica, e apresentar caminhos e ou soluções inovadoras, o que implica por parte dos participantes uma grande dedicação e trabalho.

O facto de a semi-final ter tido lugar em Maio possibilitou que os auditores pudessem trabalhar durante as férias da Páscoa a tempo inteiro no trabalho escrito, prescindindo de todo de qualquer descanso.

Todo o trabalho de pesquisa e elaboração dos textos é da exclusiva autoria dos auditores de justiça, os quais realizaram um trabalho notável de análise a nível do direito comparado e de jurisprudência do Tribunal Europeu dos Direitos do Homem.

Terminada a competição permanecem os laços criados entre os diversos participantes europeus, que se querem cada vez mais fortes e próximos na construção de uma verdadeira Comunidade Jurídica de práticas uniformes.

Enquanto docente orientadora apenas posso dar conta que foi particularmente fácil orientar estas equipas. Não obstante a minha disponibilidade, mostraram-se totalmente autónomos na pesquisa e redação dos trabalhos, dos quais apenas recebi cópia para emissão de parecer. Nada havia a alterar ou corrigir. Pesquisa profunda e exaustiva. Análise e pensamento jurídicos bem estruturados.

Já em Bruxelas ensaiamos as apresentações e eu, qual júri, lá fiz de advogada do diabo tendo conseguido identificar alguns aspetos que poderiam ser objeto da argúcia do júri.

Para além do espírito de equipa (patriótico, diga-se) criado entre nós os sete, ficam momentos de vivência, partilha e afetos que irão permanecer para a vida.

**

2.

2.1. CHILDREN IN POST-MODERN FAMILIES: THE RIGHT OF CHILDREN TO HAVE CONTACT WITH ATTACHMENT FIGURES

Team Portugal I

Andreia Martins | Bruno Alcarva | Débora Marques

Accompanying Teacher

Maria Perquilhas

CENTRO
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JUDICIÁRIOS

THEMIS COMPETITION 2017

BRUSSELS SEMI-FINAL B – EUROPEAN FAMILY LAW

CHILDREN IN POST-MODERN FAMILIES: THE RIGHT OF CHILDREN TO HAVE CONTACT WITH ATTACHMENT FIGURES

TEAM PORTUGAL I

Judicial Trainees

Andreia Martins | Bruno Alcarva | Débora Marques

Accompanying Teacher

Maria Perquilhas

"There can be no keener revelation of a society's soul than the way in which it treats its children."

Nelson Mandela
Former President of South Africa

Lisbon, 2017

CONTENTS

1. INTRODUCTION: An overview on the post-modern family

As science evolves and prejudices tend to disappear, the prototype of the traditional family, according to which a man marries a woman and afterwards have children together, is slowly fading away. This is called the nuclear family.

Nowadays, a child can be born and raised in a much broader range of situations.

Therefore, besides couples that have a biological child, we can find homosexual or heterosexual couples, that adopt children or choose to resort to medically assisted reproduction techniques or to a surrogate mother. In these cases, the child can be legally considered as being daughter/son of the couple or of solely one of the couple's element.

Moreover, there are single parents raising a child on their own, as a result of a divorce, of a single adoption, of a decision to resort to medically assisted reproduction techniques or to a surrogate mother.

There are also stepfamilies, which involves two separate families merged into one new unit.
In addition, there can be foster families that take care of children temporarily, namely when biological parents are unable to look after them.

Furthermore, the number of households with extended family members – several relatives living together – is also increasing, due to financial difficulties or because older relatives are incapable to take care of themselves.

In addition to these living arrangements, there are others where children are raised not by their parents, but by grandparents, uncles, cousins or other relatives.

Finally, the concept of family includes persons that might not have biological ties, but who, somehow, share the child's daily life and have developed strong emotional ties with the child, such as godparents. These constitute the so called *de facto* families.

We are witnessing the diversification of people who perform a fundamental role in the child's life. Thus, the traditional vision of whom the child should be allowed to have contact with must necessarily evolve.

Having said this, should the forementioned people have the right to obtain and maintain contact with children who are deeply attached to them, if that is in the child's best interest? Should parents, when exercising their parental responsibilities, have the power to prohibit these contacts? Should we give priority to the biological family during the child's upbringing or on the other hand, must we give priority to the child's best interest and facilitate contacts between children and persons that are emotionally linked to them, regardless of the existence of blood ties? Who should have legal standing in these disputes?

In attempting to find answers to these questions, and as a starting point, we will analyse the solutions envisaged by European Union countries, with a special focus on Portuguese law and case law, and present a brief overview of the European Court of Human Rights' case law.

Always bearing in mind that, as is widely acknowledged, the fundamental principle that must govern every decision that affects children is the *child's best interest*.

Afterwards, having established the most common responses, we are going to elaborate on the topic, in order to present a personal point of view and to contribute towards reaching a uniform response on how these disputes should be handled.

2. EUROPEAN LAW

2.1. Convention on Contact concerning Children

In 2003, in Strasbourg, the Council of Europe signed a Convention on Contact concerning Children. The purpose of such Convention is to safeguard contact between children and their parents and other persons having family ties with children, as protected by Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950.

The Council of Europe was aware of the desirability of recognizing not only parents but also children as holders of rights and the Member States agreed consequently to replace the term of *access to children* with the notion of *contact concerning children*.
Regarding parents, and in accordance with Articles 9 and 10 (2) of the United Nations Convention on the Rights of the Child, Article 4 (1) of the Convention on Contact concerning Children sets out that: "*A child and his or her parents shall have the right to obtain and maintain regular contact with each other*".

Besides the parents, the Council of Europe expressly agreed on the need for children to have contact with other persons having family ties with children and the importance for those persons to remain in contact with children, subject to the child's best interest.

Consequently, Article 5 (1) of the Convention on Contact concerning Children provides that "*subject to his or her best interests, contact may be established between the child and persons other than his or her parents having family ties with the child*". According to Article 2 (d) of this Convention, family ties "*means a close relationship such as between a child and his or her grandparents or siblings, based on law or on a de facto family relationship*".

This means that the Convention establishes, as a minimum standard, the obligation to promote measures in order to assist children in contacting those with whom they have a close relationship, namely grandparents or siblings.

However, Article 5 (2) of the Convention also states that "*States Parties are free to extend this provision to persons other than those mentioned in paragraph 1, and where so extended,*

States may freely decide what aspects of contact, as defined in Article 2 letter a shall apply". So, Member States have some discretion to determine the persons who are regarded by national law, namely to extend this possibility of contact to persons having close personal links with the child without family ties [(1)].

2.2. Comparative law study

Considering the approach of European countries in this matter, they can be split into three groups: a first one, composed by those with legislation providing only for contact between the child and the parents; a second one, that includes those with legislation establishing only the right of the child to maintain contact *with some relatives*, in particular grandparents and siblings; and a third group, consisting of those which combine the possibility to maintain contact with some *relatives* with a *general clause*.

Starting with the **first group**:

DENMARK

In Denmark, only parents have the right to maintain contact with their child. According to INGRID LUND-ANDERSEN and CHRISTINA GYLDENLØVE JEPPESEN DE BOER, "*No provisions provide for the possibility of contact with other family members irrespective of the role they may have played in the child's life. Grandparents, aunts, uncles, stepparents or siblings who may have played an active role in the child's life or even have raised the child for a considerable time, have no right of contact*" [(2)].

POLAND

The Polish Law does not regulate the relationships between the child and other relatives besides the parents [Article 95 (1) of the Polish Family and Guardianship Code] [(3)].

The **second group,** in which the Portuguese approach is included – a topic that will be developed further ahead – also comprises Italian Law.

ITALY

Article 315bis (2) of the Italian Civil Code establishes: *"The child has the right to grow in his family and to maintain a significant relationship with his relatives"*. However, Article 317bis of the Italian Civil Code, added in December of 2013, merely took in consideration *the grandparent's right to maintain contact with their grandchildren*.

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(1) For further development, Parliamentary Assembly Documents 2002 Ordinary Session (First Part), Volume II (from the Parliamentary Assembly of the Council Europe), consulted on 11 April 2017 *in* https://play.google.com/books/reader?id=4ZP1HFSDZ4EC&printsec=frontcover&output=reader&hl=pt_PT&pg=GBS.PA1.

(2) LUND-ANDERSEN, Ingrid and JEPPESEN DE BOER, Christina Gyldenløve, *National Report: Denmark*. Available at: http://ceflonline.net/wp-content/uploads/Denmark-Parental-Responsibilities.pdf and consulted on 7 April 2017.

(3) MĄCZYŃSKI, Andrzej and MĄCZYŃSKA, Mgr Jadwiga, *National Report: Poland*, Human Rights Centre of the Jagiellonian University, page 15. Available at: http://ceflonline.net/wp-content/uploads/Poland-Parental-Responsibilities.pdf and consulted on 7 April 2017.

The **third group** ensures a comprehensive view of the child's right to maintain personal relationships with persons other than parents.

SPAIN

The Spanish law approach is paradigmatic on this perspective. Article 160 (2) of the Spanish Civil Code, states that *"personal relationships between the child and his siblings, grandparents and other relatives or close persons may not be deprived without just cause. In the event of opposition, the Judge, at the request of the minor, his grandparents, relatives or close persons, shall decide, according to the circumstances"*. This same regime can be found in Article 77 (2) (b) and also in Article 79, both from the *Código del Derecho Foral de Aragón*. Article 236-4 of *Código Civil Cataluña* also prescribes that *"The child has the right to maintain personal relationships with his grandparents, siblings and other close persons, and all of them also have the right to contact with the child. Parents must facilitate the mentioned relationships and can only prevent them if there's a just cause".*

NETHERLANDS

Article 1:377a of the Dutch Civil Code determines: *"1 – A child has a right of contact with his parents and with those persons with whom the child maintains a close personal relation (…). / 2 – Upon the request of both parents or of one of them or upon the request of the persons with whom the child maintains a close personal relation, the court shall order an arrangement for exercising the right of contact ('visitation arrangement'), whether or not for a specific period, or it shall deny the right of contact, whether or not for a specific period".*

BELGIUM

Article 375 bis of the Belgium Civil Code establishes that: *"The grandparents have the right to maintain personal relationships with the child. The same right may be granted to any other person if the latter has a special affectionate relationship. In the absence of agreement between the parties, the exercise of this right shall be ruled by the family court, at the request of the parties or the King's Public Prosecutor, according to the child's best interest"*. WALTER PINTENS and DOMINIQUE PIGNOLET state that *"according to Art. 375 bis Belgian CC, a child has the right of contact with its grandparents when it is proved that it is in the child's interests. For all other persons (including brothers and sisters of the child), it must also be proved that the child has a significant, affectionate relationship with the persons seeking the right"* [(4)].

GERMANY

Article 1685 (1) of the German Civil Code, recognises that "*grandparents and siblings have a right to contact with the child if this serves the best interests of the child"*. The second paragraph of this provision establishes: *"The same applies to persons to whom the child relates closely if these have or have had actual responsibility for the child (social and family relationship). It is in general to be assumed that actual responsibility has been taken on if the person has been living for a long period in domestic community with the child"*.

[(4)] PINTENS, Walter and PIGNOLET, Dominique, *National Report: Belgium*, Catholic University Leuven, page 30. Available at: http://ceflonline.net/wp-content/uploads/Belgium-Parental-Responsibilities.pdf and consulted on 7 April 2017.

According to NINA DETHLOFF and DIETER MARTINY, "*under the new version of §1685 para. 2 German CC there is no longer an exclusive enumeration of the different persons with a right to contact. It is agreed however that also the spouse of the parent (step-parent) has a right of personal contact. The same is true for the former spouse and the former partner of a non-marital relationship. The registered partner or former registered partner has also such a right of contact. Other persons can have such a right when they acted as foster carers over some length of time*" [(5)].

SWEDEN

Swedish law also considers that the child needs to have gratifying relationships, not only with the parents, but also with other relatives and close persons, if this is in the child's best interest and if the child so desires (Chapter 6, Sec. 2a of the Swedish Children and Parents Code) [(6)]. Moreover, the Swedish contemporary legal system perceives this possibility as a child's right and simultaneously as a parent's responsibility [(7)].

According to MAARIT JÄNTERÄ-JAREBORG, ANNA SINGER AND CAROLINE SÖRGJERD, *"the interests of a parent are not explicitly considered when deciding in contact issues. It is the best interests of the child that shall prevail over all other concerns in matters regarding contact"* [(8)]. And also: *"A person with custody of a child has a responsibility to ensure that, as far as possible, a child's need of contact with any other person particularly close to the child is met, Chapter 6 Sec. 15 paragraph 3 Swedish Children and Parents Code. This provision aims at encouraging the child's contact not only with persons the child knows well and misses, but also with, e.g., relatives who enrich the child's development. (…) The starting point in Swedish law is that contact is the right of the child; the parents are responsible to ensure that this right is met*" [(9)].

SLOVENIA

In accordance with Article 106a (1), of the Slovenian Civil Code: *"The child has the right to contact with other persons who are family related and have a close personal bond with the child, unless it would be contrary to the child's interest. Such persons are deemed to be in particular the child's grandparents, siblings, half-siblings, former foster parents, a former or present spouse, or the cohabiting partner of either parent of the child"*.

The second paragraph of this provision imposes an agreement between the parents, the child itself (if capable of understanding the meaning of such agreement) and the persons referred to in the prior paragraph. Without such agreement, a social worker shall assist them in reaching an agreement; if the disagreement persists, the court will decide [Article 106a (3) of the Slovenian Civil Code].

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(5) DETHLOFF, Nina and MARTINY, Dieter, *National Report: Germany*, European University, Frankfurt. Available at: http://ceflonline.net/wp-content/uploads/Germany-Parental-Responsibilities.pdf and consulted on 7 April 2017.
(6) RESETAR, Branka and EMERY, Robert E., *Children's rights in European Legal Proceedings: Why are family practices so different from legal theories?*, page 68. Available at: http://onlinelibrary.wiley.com/doi/10.1111/j.1744-1617.2007.00193.x/pdf and consulted on 7 April 2017.
(7) *Ibidem.*
(8) JÄNTERÄ-JAREBORG, Maarit; SINGER, Anna and SÖRGJERD, Caroline, *National Report: Sweden*, University of Uppsala, page 25. Available at: http://ceflonline.net/wp-content/uploads/Sweden-Parental-Responsibilities.pdf and consulted on 7 April 2017.
(9) *Ibidem*, pages 25 and 26.

AUSTRIA

Section 148 (3) of the Austrian Civil Code allows personal contact with persons other than parents with whom the child has an emotional bond and if it is considered harmful for the child to disrupt that bond. According to MARIANNE ROTH, this regulation includes grandparents, stepparents, foster parents, uncles, godparents, siblings and also former partners of the holder of parental responsibilities [(10)].

2.3. Portuguese law

Currently, in Portugal, the contact between a child and persons other than parents is regulated under Article 1887.º-A of the Portuguese Civil Code. This rule was introduced in the Portuguese legal order by Law no. 84/95, of 31 September. Before this amendment, Portuguese law only established the right of contact towards parents.

So, according to Article 1887.º-A, parents may not unreasonably deprive their children from contacting siblings and grandparents.

This means that, presently, it is possible that other persons apart from parents may obtain and maintain contact with the child [(11)].

Traditionally, it was understood that Portuguese law did not expressly grant any right for the child to establish relationships with other relatives, but only provided it as a limitation to parental responsibility. Nowadays, this paradigm is changing, according to the majority of Portuguese authors and domestic case law, based on the idea that the parents no longer have the power to decide with whom the child may have contact. However, parents still have the duty to select the persons that may interact with the child, taking into account the child's best interest.

It is also necessary to underline that the law limits this possibility of contact to siblings and grandparents, as persons having a close family relationship with the child. Indeed, Portuguese law presumes that siblings and grandparents may play a considerable part in family life and have a close relationship with the child that should be protected.

However, Portuguese law does not extend this right of contact to other categories of persons. For instance, there is no legal provision granting this contact to: (i) other relatives of the child such as an aunt or an uncle, a cousin, a godfather or a godmother; (ii) persons having, at present, *de facto* family ties with the child and persons who have had *de facto* family ties with the child in the recent past, independent of any legal family ties (for example, former foster parents, a spouse or former spouse of a parent, a person with whom the child has been living in the same household for a considerable period of time, a person who has cohabited with a

(10) ROTH, Marianne, *National Report: Austria,* University of Salzburg, pages 30 and 31. Available at: http://ceflonline.net/wp-content/uploads/Austria-Parental-Responsibilities.pdf and consulted on 7 April 2017.
(11) For further development, OLIVEIRA, Guilherme de and MARTINS, Rosa, *National Report: Portugal*. Available at: http://ceflonline.net/wp-content/uploads/Portugal-Parental-Responsibilities.pdf and consulted on 7 April 2017.

parent and the child); or (iii) persons that only have affectionate ties with the child, regardless of any biological or family ties.

Notwithstanding the foregoing, Portuguese courts have been asked to solve conflicts related to the right of contact between children and persons other than siblings and grandparents.

In June 2012, the Portuguese Court of Appeal of Coimbra [(12)] delivered a groundbreaking decision, based on the child's best interest, granting the godfather the possibility of maintaining contact with his godchild. The decision relied on the fact that the child had lived with the godfather for seven years. During such period of time, the godfather became a reference person in the child's life and a relationship identical to parenthood was established between them.

In July 2014, the Portuguese Court of Appeal of Évora [(13)] admitted the possibility of contact between a child and his aunt, following a decision held by the Portuguese Court of Appeal of Oporto in January 2013 [(14)]. More recently, in November 2016, the Portuguese Court of Appeal of Guimarães [(15)] also ruled that an order providing for contact between an aunt and a child – taking into account that the aunt took care of the niece and maintained a close relationship with her – should be granted.

Considering the absence of a legal provision regulating the right of contact between child and persons others than parents, grandparents and siblings, the above mentioned decisions were forward-looking and innovative, supported especially by the child's best interest.
Nevertheless, in order to achieve this outcome, Portuguese courts considered it necessary to ground their decisions in Article 1918.º of Portuguese Civil Code which states: "*When the safety, health, moral development or education of a child are in danger and inhibition of the exercise of parental responsibilities is not applicable, at the request of the Public Prosecutor's Office or of any of the persons referred to in number 1 of Article 1915.º, the court may decree the necessary protective measures*".

By doing so, the courts defended that a child prevented from contact with certain persons was endangered, which does not correspond necessarily to reality. It is important to make clear that the contact between a child and persons other than parents should be a right of the child, take place under all circumstances if it contributes positively to the development of the child and bring happiness to him or her, regardless of the child being or not in danger.

(12) Portuguese Court of Appeal of Coimbra, 20.06.2012, CARLOS MARINHO, Case no. 450/11.7TBTNVA.C1, available at www.dgsi.pt.
(13) Portuguese Court of Appeal of Évora, 10.07.2014, ALEXANDRA MOURA SANTOS, Case no. 851/12.3TBPTGA.E1, available at www.dgsi.pt.
(14) Portuguese Court of Appeal of Oporto, 07.01.2013, LUÍS LAMEIRAS, Case no. 762A/2001.P1, available at www.dgsi.pt.
(15) Portuguese Court of Appeal of Guimarães, 10.11.2016, MARIA DOS ANJOS NOGUEIRA, Case no. 719/08.8TBBCLC.G1, available at www.dgsi.pt.

2.4. Brief overview of the European Court of Human Rights' case law

The European Court of Human Rights (ECtHR) has been called upon to decide disputes between parents and other persons who aim to obtain or maintain contact with a child. By solving those disputes, the ECtHR has created uniform case law. Below, we will outline the main decisions regarding this topic.

According to the ECtHR the notion of *family life* under Article 8 of the European Convention of Human Rights (ECHR) is not confined to marriage-based relationships and may encompass other *de facto* family ties where the parties are living together out of wedlock (Case Anayo vs. Germany, §55; Case Kopf and Liberda vs. Austria, §35).

Moreover, in the ECtHR's vision, *family life* "*within the meaning of Article 8 (art. 8), includes at least the ties between near relatives, for instance those between grandparents and grandchildren, since such relatives may play a considerable part in family life"* (see, among others, Case of Marckx vs. Belgium, §45; Case Moretti and Benedetti vs. Italie, §§44, 45; Case Lawlor vs. United Kingdom; Kruškić and others vs. Croatia, §108).

The Court also states that the existence or not of family ties falling within the scope of Article 8 of the ECHR will depend on a number of factors, of which cohabitation is only one and on the circumstances of each particular case: exceptionally, other factors may also serve to demonstrate that a relationship has sufficient constancy to create *de facto* family ties (see Case Lawlor vs. United Kingdom; Case Kroon and others vs. The Netherlands, §30; Case Kopf and Liberda vs. Austria, §35; Kruškić and others vs. Croatia, §108). Furthermore, the existence of *family life* is essentially a question of fact depending on the real existence of close personal ties (Case K. and T. vs. Finland, §150; Case Kopf and Liberda vs. Austria, §35).

Notwithstanding, the Court has been ruling that the relationship between the child and other relatives is different in nature and degree from the relationship between parents and the child, which means, in the Court's opinion, the first situation generally demands a lesser degree of protection. The ECtHR adopts this position, since those contacts normally take place with the agreement of the person who has parental responsibility – which means that access of a relative to the child is normally at the discretion of the child's parents (Case Kruškić and others vs. Croatia, §§110-112; Case Lawlor vs. United Kingdom; Case Mitovi vs. The Former Yugoslav Republic of Macedonia, §58).

In order to guarantee compliance with Article 8 of the ECHR, the Court finds that although the object of this provision is essentially the protection of the individuals against arbitrary interference by the public authorities, there also may be *positive obligations* inherent in an effective respect for private or family life. The ECtHR refers: "*However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests and in both contexts the State enjoys a certain margin of appreciation*" (*vide* Case

Kopf and Liberda vs. Austria, §38; Case Mustafa and Armağan Akin vs. Turkey, §20; Case of Fuşcă vs. Romania, §33).

Consequently, the domestic authorities should strike a fair balance between the interests of the child and those of the parents and that, in the balancing process, particular importance should be attached to the child's best interest which, depending on their nature and seriousness, may override those of the parents. In particular, a parent cannot be entitled under Article 8 of the Convention to have such measures taken as would harm the child's health and development (Case Görgülü vs. Germany, §43; Case Levin vs. Sweden). The same applies to cases where contact and residence disputes concerning children arise between parents and other members of the children's family (Case N.TS. and others v. Georgia, §70).

The States have the obligation and must guarantee the maintenance of the ties, taking the necessary actions in order to allow those ties to develop normally (Case Kruškić and others vs. Croatia, §110; Case of Marckx vs. Belgium, §45). In this regard, measures that might break the ties between a child and his or her family can only be applied in exceptional circumstances (see Manuello and Nevi vs. Italie, §53; Case Görgülü vs. Germany, §48).

In a nutshell, the analysis of the Court will primarily take into account the child's best interest (Case Mustafa and Armağan Akin vs. Turkey, §22; Case Görgülü vs. Germany, §41; Case Levin vs. Sweden).

In the Case Kopf and Liberda vs. Austria, the Court had to decide if the contacts between the former foster parents and a child that had been returned to his mother should be re-established: «*The Court observes, however, that the District Court did consider the case on its merits and, as is apparent from its decision, examined whether contact between the applicants and F. would be in the child's best interests. It concluded, however, that it was in the best interests of the child, who was living with his biological mother, not to bring him back into a situation of divided loyalties (Loyalitätskonflikt) between her and his "former family", namely the applicants, and the District Court therefore refused the request. Moreover, the Regional Court examined the applicants' appeal on the merits but concluded that the District Court had correctly resolved the matter before it. The Court (…) considers that the domestic courts, at the time they took their respective decisions, struck a fair balance between the competing interests. (…) In this context the Court reiterates that, in the balancing process, particular importance should be attached to the best interests of the child, which may override those of the parents*». The Court took in consideration that contact between the applicants (foster parents) and the child had been interrupted for 3 years (the duration of the proceedings) and for that reason the child's best interest no longer justified the re-establishment of contact. Therefore the ECtHR underlines the necessity to take measures to ensure that proceedings involving children should be decided within a reasonable period of time.

It is also crucial to emphasize the most important lesson extracted from the ECtHR case law: in some cases, emotional bonds may prevail over blood ties (as decided, for instance, in the Case Söderbäck vs. Sweden).

Finally, it is important to highlight that there are not any ECHR provisions specifically focused on children, which falls short of their needs.

3. THE RIGHT OF CONTACT BETWEEN THE CHILD AND ATTACHMENT FIGURES

3.1. General considerations

The Convention on the Rights of the Child recognizes *that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding* [(16)] and lists the rights that must be fulfilled for children to develop their full potential.

As foreseen in Article 6 (2) of this Convention, "*States Parties shall ensure to the maximum extent possible the survival and development of the child*", as well as in Article 27, "*1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. / 2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development".*

This reflects a new and contemporary vision of the child. Children cannot be considered as property of their parents. They are human beings and are holders of their own rights, rather than just objects of protection.

The child should be recognised as an individual and as a member of a family and community, with rights and responsibilities, appropriate to his or her age and stage of development. By doing so, we are setting the focus on the whole child.

Furthermore, our understanding is that the child should be at the heart of family life.

One of the main categories of the child's rights pertains to the free development of his or her personality. In order to achieve it, the social interaction between human beings has a decisive role. Starting at an early age, social interaction is fundamental for a healthy childhood development, bringing positive consequences throughout his or her entire life and improving the individual personality and capabilities [(17)].

[(16)] Preamble of the Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with Article 49.
[(17)] MARTINS, Rosa and VÍTOR, Paula Távora, "*O direito dos avós às relações pessoais com os netos na jurisprudência recente*" *in* Julgar, no. 10, 2010, page 67.

3.2. The concept of contacts

Considering the above-mentioned, it is vital to ensure that the child has the right to have contact with the persons who have (or had) a positive contribution to their physical and psychological growth and well-being.
According to Article 2 (a) of the Convention on Contact concerning Children, of the Council of Europe, this right of contact shall include:

i. The possibility of a child to stay with, or meeting a person, for a limited period of time, with whom he or she is not usually living;
ii. Any form of communication between the child and such person, such as contact by telephone, Skype, social networks and e-mail; and
iii. The provision of information to such a person about the child or to the child about such a person.

Under Article 2 (10), of the Council Regulation (EC) N.º 2201/2003, of 27 November 2003 – known colloquially as Brussels II bis – a similar notion of contact is established – although the concept *rights of access* is used [(18)].

3.3. Right of contact as a *purely personal right*

The child, as a minor, does not have legal capacity to exercise rights. Thus, the parents have the power and duty of representation, exercising those rights on the children's behalf in order to make up for the minor's lack of capacity.

It is the parents' responsibility to represent their children's interests even before they are born.

There are, however, some rights that are *purely personal*, which the child has the right to perform personally and freely. Consequently, those rights cannot be exercised by the parents.

The right of contact is included in this category of rights – designated as *purely personal right*.
For this reason, in our perspective, the right of contact cannot be understood as a limitation of parental responsibilities, taking in account that its exercise would not, in any case, belong to the parents. In other words, parents do not have the right to deprive children from having contact with persons that bring healthy benefits to their lives in a significant manner. What they have, instead, is an obligation to exercise control by deciding whether or not these persons represent harm to the child.

[(18)] Practice guide for the application of the Brussels IIa Regulation from European Commission *in* http://ec.europa.eu/justice/civil/files/brussels_ii_practice_guide_en.pdf, page 43, accessed in 7 April 2017.

3.4. The purposes of contact

The first thing to consider concerning the right is what objective will contact serve for the child. The paramount purpose of this right is to ensure that they have, somehow, beneficial effects and provide the child a fuller and happier life.
The connections are of critical importance, since they lead to maintaining, building and developing relationships important to the child, in order to meet their emotional needs for love, sense of belonging and stability. Furthermore, contacts contribute to create opportunities for education and modelling of child's specific skills and abilities.

The purpose of contact for a child can and will change over time, depending on the child's emotional and developmental needs, their wishes and circumstances. Thus, the decision that grants the right to obtain and maintain contacts is not irrevocable and can be reviewed, in order to achieve the child's best interest, at any given time, according to his or her age and developmental stage. In case of a review, it is essential to evaluate if the child's needs are actually being met.

3.5. Terms and requirements for the exercise of the right of contact

This right shall be always subject to the condition that this contact is in the child's best interest, which should also be the final goal of its exercise, as provided in Article 3 (1) of the Convention on the Rights of the Child and Article 24 (2) of the Charter of Fundamental Rights of the European Union.

Having that in mind, this right may be exercised at all times, whenever the child, on his or her initiative or the persons who wish to obtain or maintain contacts apply for it. However, when the child's best interest is in conflict with the adults' needs, the first one has to prevail, both in the short and long term.

It should be underlined and must not be forgotten that it is not a prerequisite that this child is endangered, at risk, deprived of affection or in a depressive emotional state. And, from the child's perspective, opinions and feelings, there is no difference whatsoever between having or not having a biological bond with these persons.

Therefore, any decision regarding contacts concerning the child cannot be taken without the child's prior hearing, providing that he or she has sufficient understanding. The child should be asked about how he or she feels about having contact with a particular person and the child should be granted the possibility to refuse such contact, if reasonable reasons are presented.

3.6. With which persons should the child have contact?

The most traditional answer limited this possibility of contact to only the parents, which could then freely decide with whom their children were authorised to interact.

This understanding evolved and expanded to close relatives, such as grandparents or siblings. The previous answers are based on a restricted view of what the concept of *family* means, giving a greater significance to the existence of blood ties, in comparison with a relationship based on love and care.

The widening of the definition of *family*, which has also been developed by the ECtHR, regarding Article 8 of the ECHR, started to cover *de facto* family relationships with a child, namely including stepfathers or foster parents.

Finally, from our point view, the modern response to this query should necessarily be that all persons who have decisive importance and influence in the child's life, enriching the child's development, should have the opportunity to obtain and maintain contact with the child.

We can find, namely, examples of babysitters who raised children from birth, and in some cases were like a mother to that child. Or friends or neighbours who are left in charge, by parents, to go pick their daughter/son at school and end up spending more time with them, than their own parents. These – and other similar cases – illustrate situations regarding persons that might have the right to maintain contact with children.

When the child's best interest is respected and provided that a significant affectionate relationship between them and the child is proven in every case, the child should be entitled to contact with any person considered by him or her as an *attachment figure* [(19)].

We consider that the most adequate provision to regulate the contacts between the child and persons other than parents should be broad enough to include anyone who established a significant affectionate relationship with the child (with or without biological ties). On the other hand, it should be highlighted that biological ties must not entail, automatically, the right to establish contacts with the child.

Overall, what must prevail is a concept of family as a community based on affection, rather than a mere group of individuals linked by biological ties.

3.7. Legal standing to apply for contacts

As mentioned before, we are facing a *purely personal right* of the child to obtain and maintain contacts with attachment figures. But is it possible to state that these persons are also holders of the right to contact the child? In this matter, we agree with ROSA MARTINS *et al* [(20)] and

[(19)] About the concept of "*attachment figures*" see MADEIRA, Laura Fernandes, "*Direito das crianças à convivência com familiares*" *in* Revista da Faculdade de Direito da Universidade Lusófona do Porto, V. 8, no. 8, page 58, available at http://unl-pt.academia.edu/LauraFernandesMadeira and consulted on 11 April 2017.
[(20)] MARTINS, Rosa and VÍTOR, Paula Távora, "*O direito dos avós às relações pessoais com os netos na jurisprudência recente*" *in* Julgar, no. 10, 2010, pages 64 and 65.

RIVERO HERNÁNDEZ [21], who reply in the affirmative. These rights are independent and reciprocal, although the adult's right must lose out if contrary to the child's best interest.

Consequently the legal standing to apply for contact with an attachment figure should belong both to the child and to the potential attachment figures.

4. CONCLUSION

The *family* is an ever changing reality: what was considered, several years ago, as the traditional family model and recognised as ideal to raise children, has completely changed. Side by side with the traditional idea of one mother and father with a common biological child (nuclear family), nowadays new family structures appear, such as foster families, adoptive families (heterosexual or homosexual), single parent's families, stepfamilies, extended families and *de facto* families.

The common element which must stand as the backbone of all these family structures is love and affection. Without these, strong emotional ties will not be developed [22]. And the mere existence of biological links do not necessarily mean, in any way, the presence of those feelings or ties.

Taking into account the above-mentioned, the law has to adapt its provisions to the new types of family, having in consideration that the legal concept of best interest has to mandatorily match the psychological best interest of the child.

For this reason and focusing the discussion on the child's right of contact, it is critical to create a specific rule that governs this particular issue. Therefore, our suggestion would be:

> *The child has the right to obtain and maintain contacts with any person with whom the child established significant emotional ties, unless it is considered contrary to the child's best interest.*

However the question is: where should this provision be included?

After over a quarter of a century, by signing the Convention on the Rights of the Child, a commitment was made to children: that they would be treated as holders of rights and be placed at the heart of the community.

However, this commitment must be renewed, as times have evolved and the awareness of the child's needs and concerns has significantly increased. Hence in this new context, it is imperative that the Council of Europe step forward and create a new and updated document

[21] ERNÁNDEZ, Francisco Rivero, "*Las relaciones familiares entre nietos y abuelos sgún la Ley de 21 de noviembre de 2003*" *in* Lex Familiae, Year 3, no. 6, 2006, page 41.
[22] For further development about the evolution of the family concept see SILVA, Júlio Barbosa, "*O Direito da criança na manutenção das suas relações com terceiros afectivamente significativos: o presente (e uma proposta para o futuro)*" *in* Revista do CEJ, I, 2015, pages 113 to 158.

concerning children. The necessity for a European Charter of Child's Rights urges this. It should be treated in an equivalent manner as the European Convention on Human Rights, reflect the ECtHR case law, and offer the possibility for any person to access the European Court of Human Rights and present their claim, in case of any violation of its provisions.

Having said this, we consider that the proposed rule should be part of this new Charter, more specifically in the chapter concerning *Development rights*, since contacts with attachment figures are indispensable for the child's psychological and emotional growth and, most of all, for the child's happiness.

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CHILDREN IN POST-MODERN FAMILIES:
THE RIGHT OF CHILDREN TO HAVE CONTACT WITH ATTACHMENT FIGURES
Team Portugal I
Centro de Estudos Judiciários
Case Kopf and Liberda vs. Austria
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THE NEW FILM BY HIROKAZU KORE-EDA
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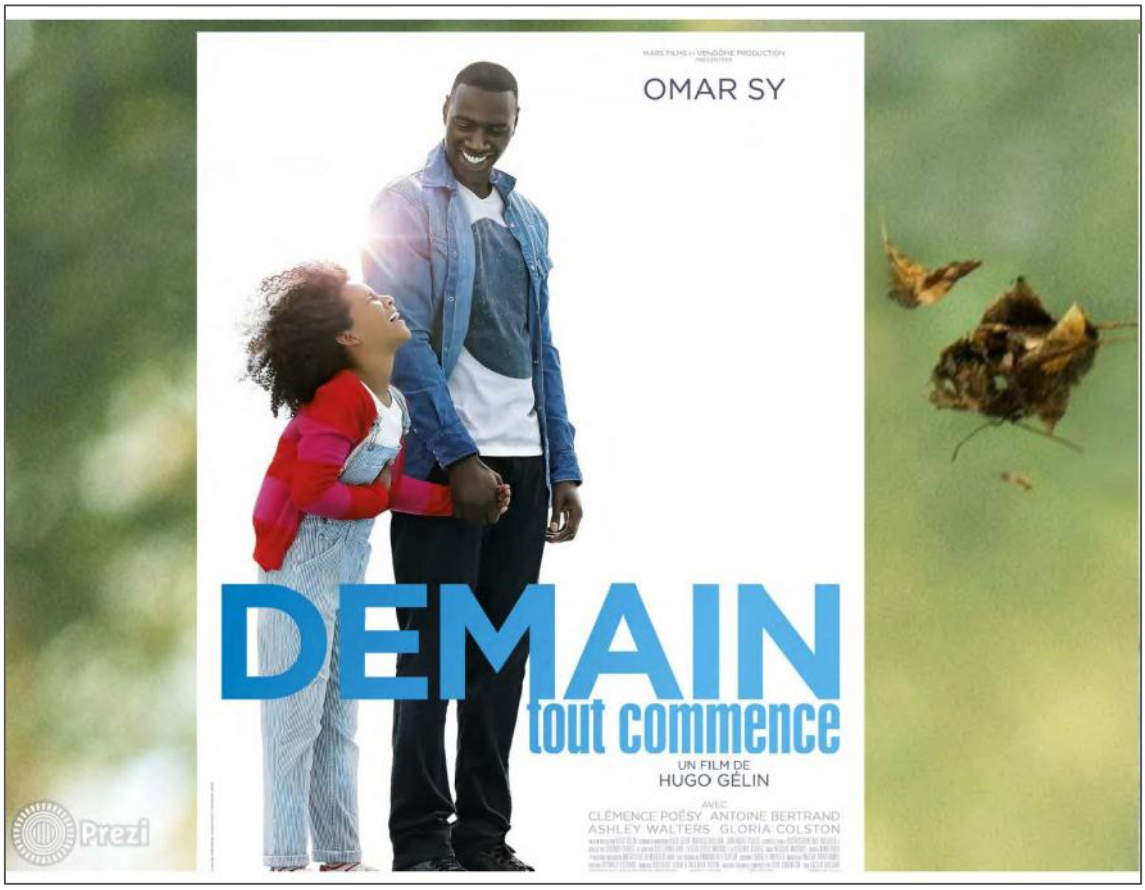
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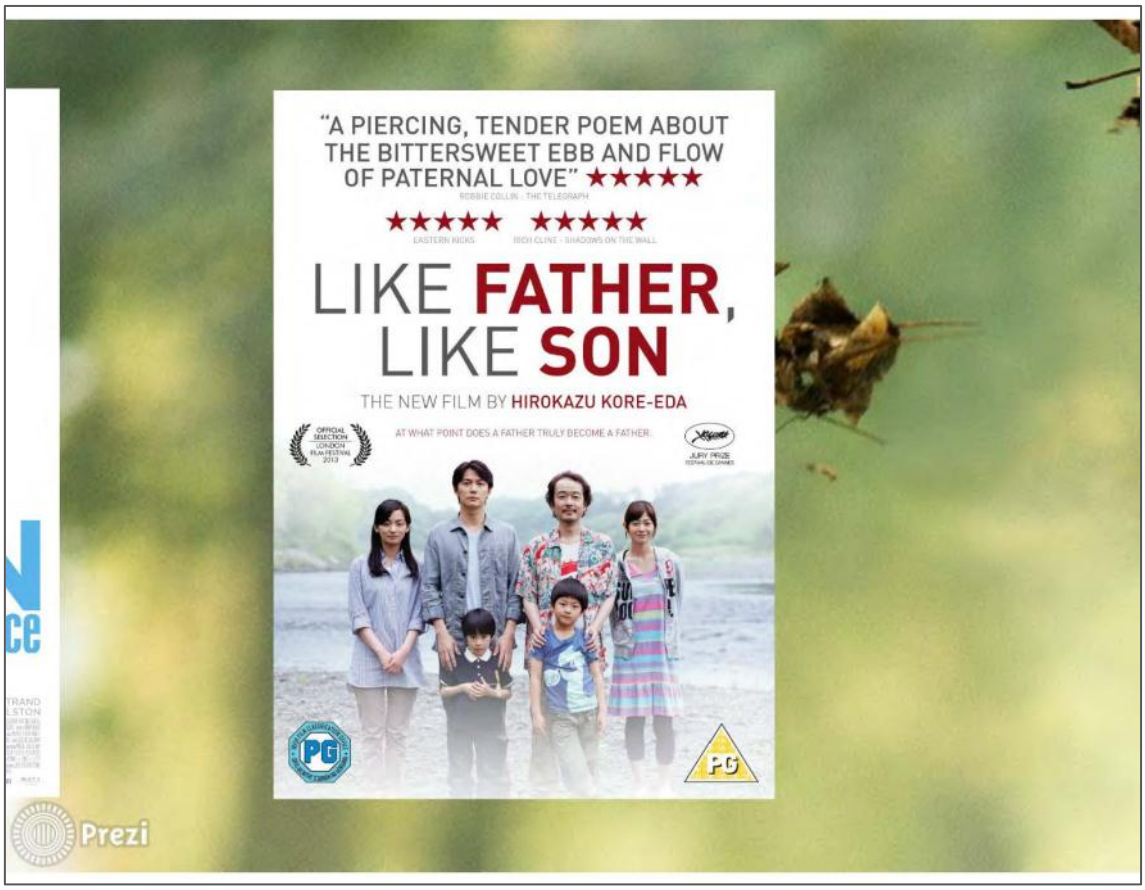
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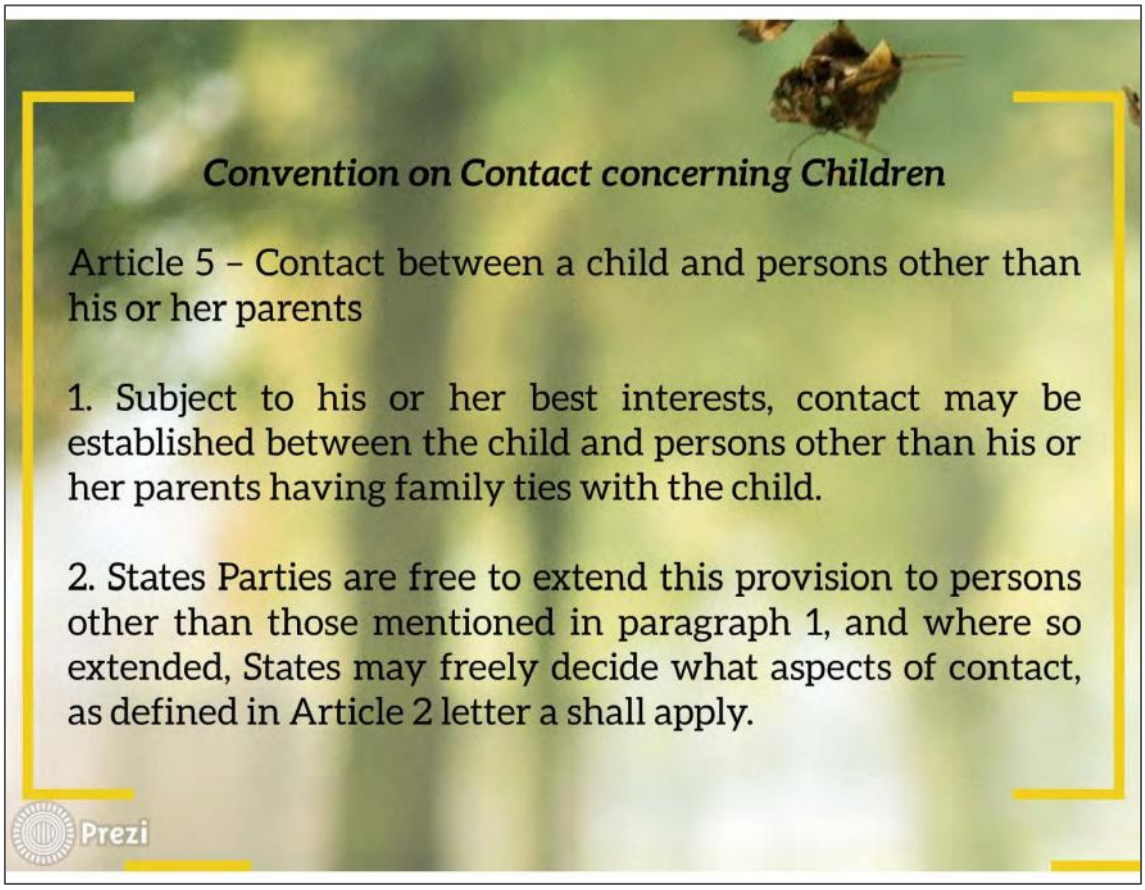
Convention on Contact concerning Children
Article 5 – Contact between a child and persons other than his or her parents
1. Subject to his or her best interests, contact may be established between the child and persons other than his or her parents having family ties with the child.
2. States Parties are free to extend this provision to persons other than those mentioned in paragraph 1, and where so extended, States may freely decide what aspects of contact, as defined in Article 2 letter a shall apply.
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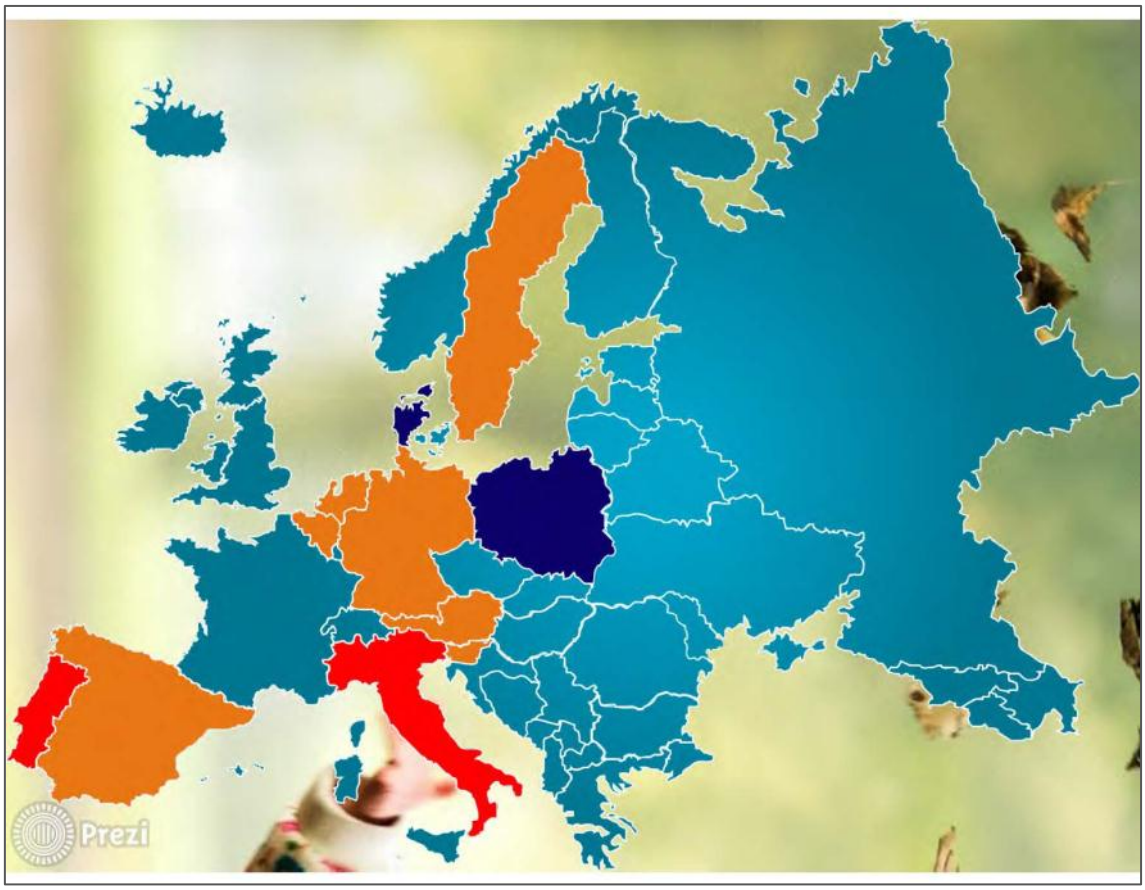
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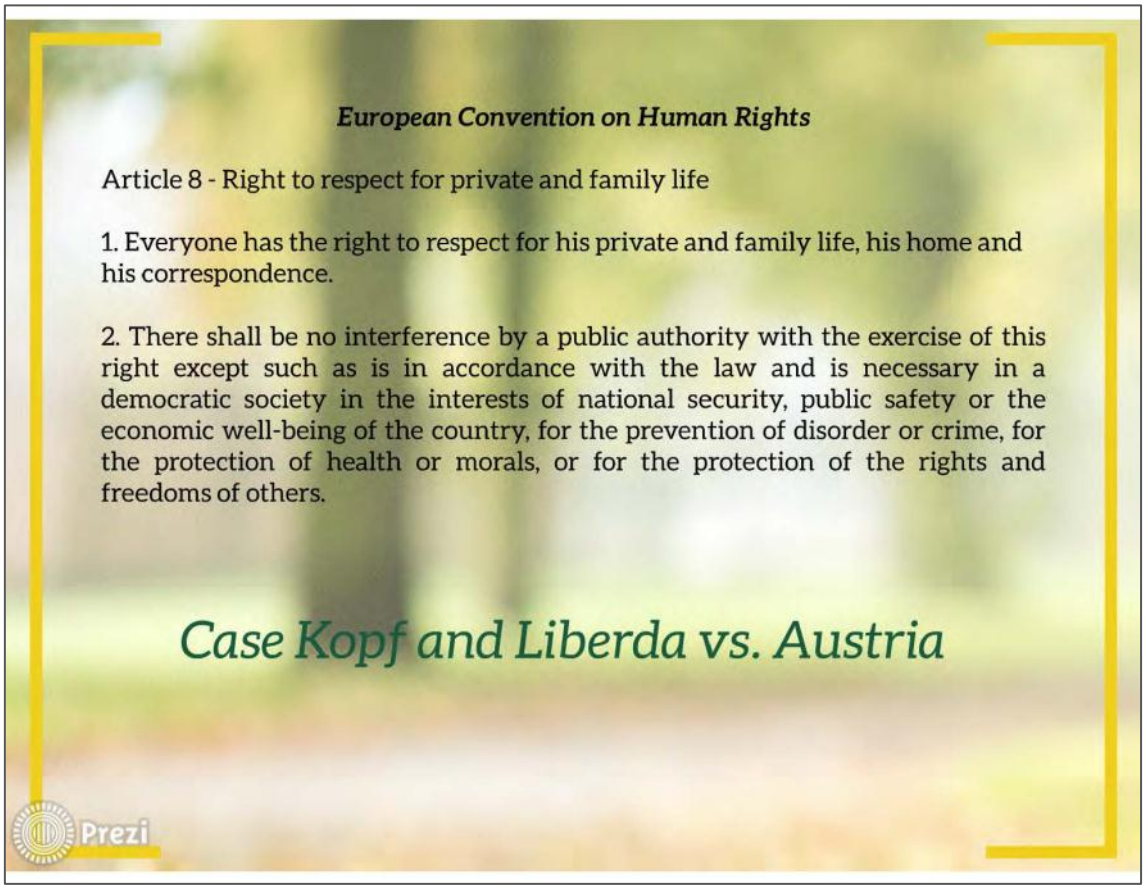
European Convention on Human Rights
Article 8 - Right to respect for private and family life
1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
Case Kopf and Liberda vs. Austria
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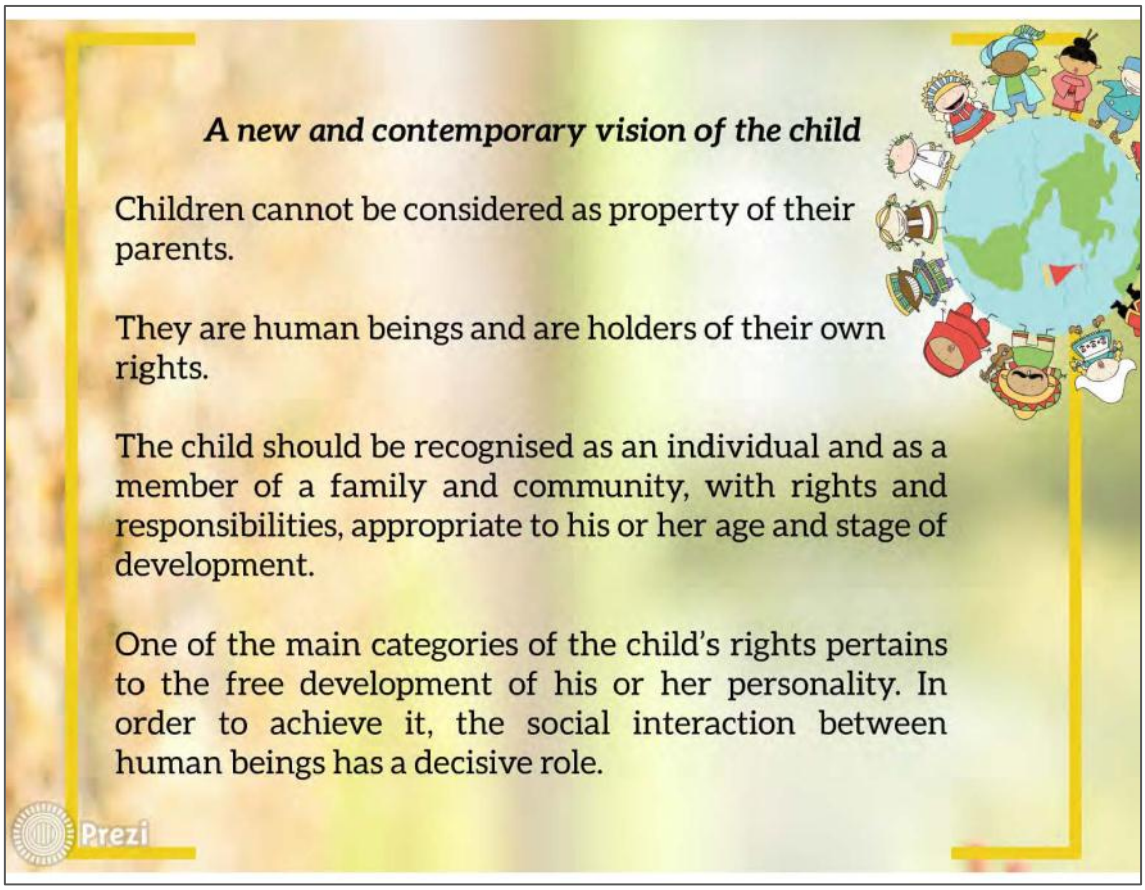
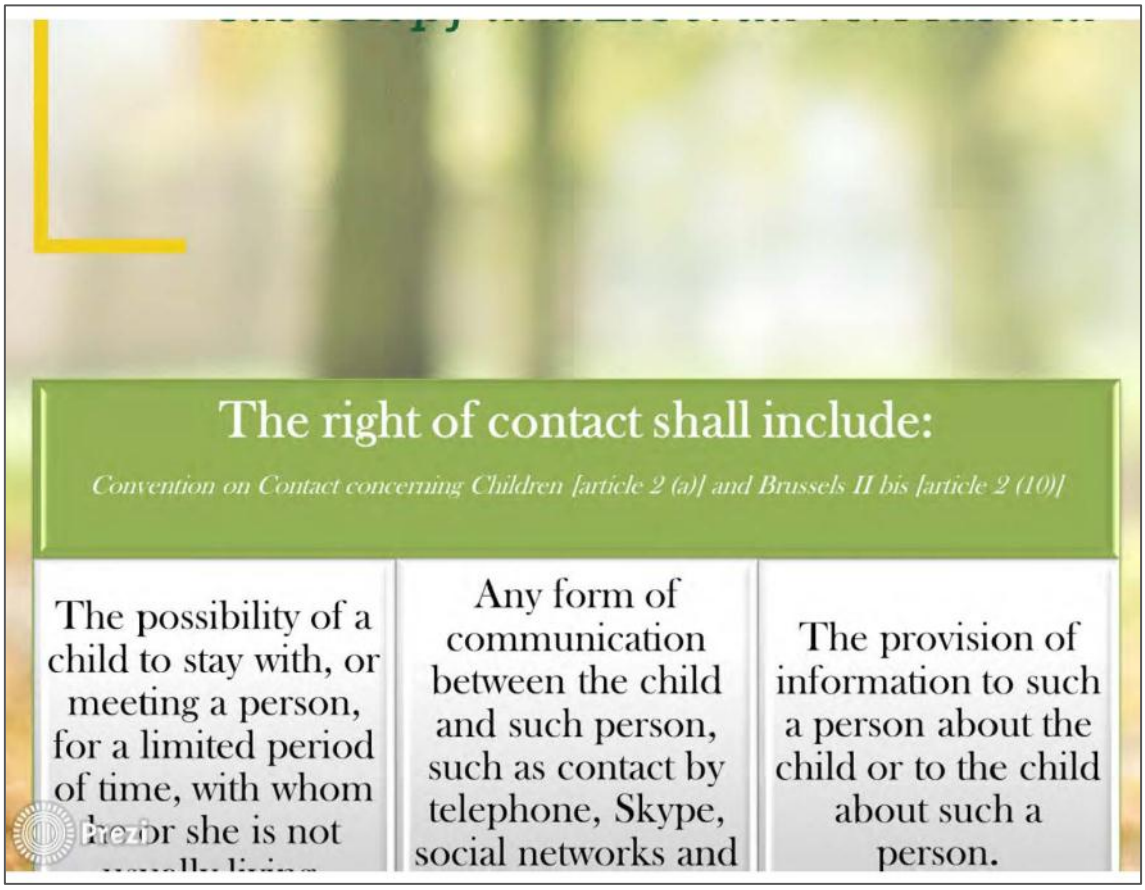

A new and contemporary vision of the child
Children cannot be considered as property of their parents.
They are human beings and are holders of their own rights.
The child should be recognised as an individual and as a member of a family and community, with rights and responsibilities, appropriate to his or her age and stage of development.
One of the main categories of the child's rights pertains to the free development of his or her personality. In order to achieve it, the social interaction between human beings has a decisive role.
Prezi


The right of contact shall include:
Convention on Contact concerning Children [article 2 (a)] and Brussels II bis [article 2 (10)]
The possibility of a child to stay with, or meeting a person, for a limited period of time, with whom
Any form of communication between the child and such person, such as contact by telephone, Skype, social networks and
The provision of information to such a person about the child or to the child about such a person.
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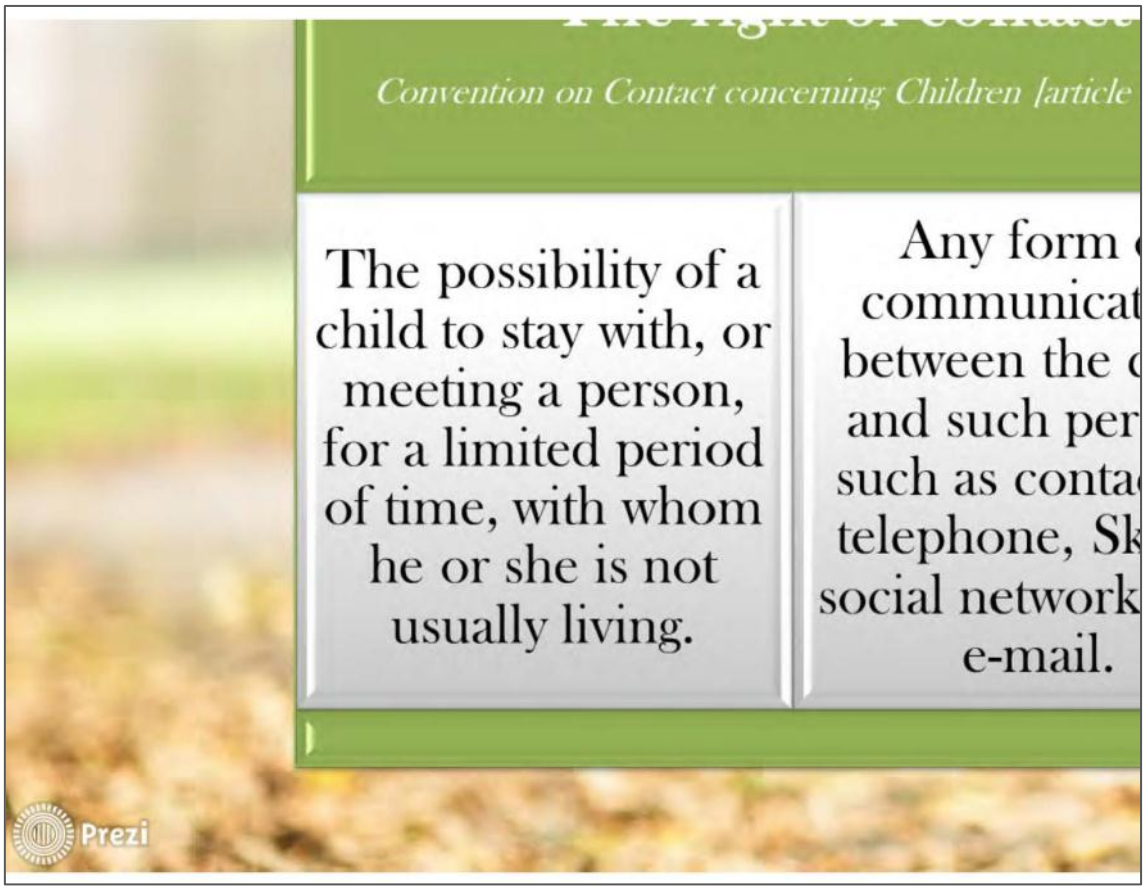
Convention on Contact concerning Children [article
The possibility of a child to stay with, or meeting a person, for a limited period of time, with whom he or she is not usually living.
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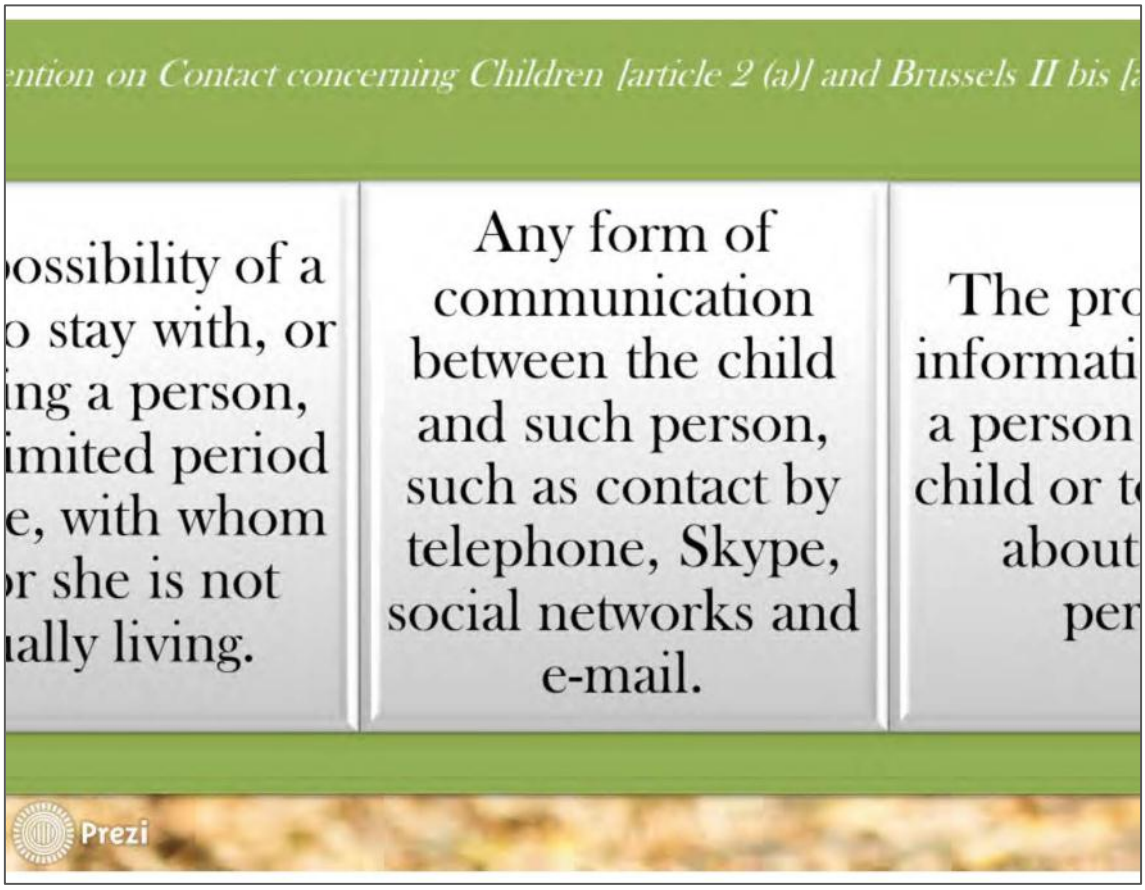
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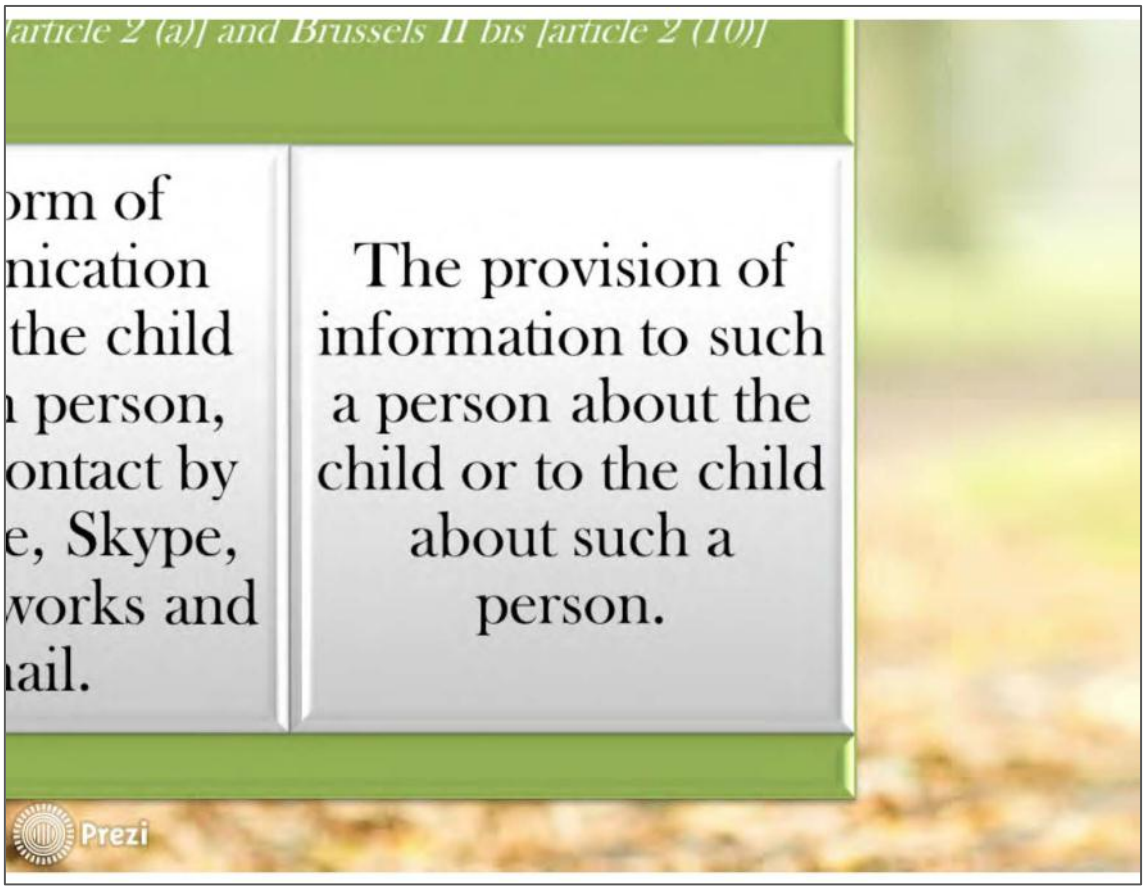
article 2 (a)] and Brussels II bis [article 2 (10)]
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The provision of information to such a person about the child or to the child about such a person.
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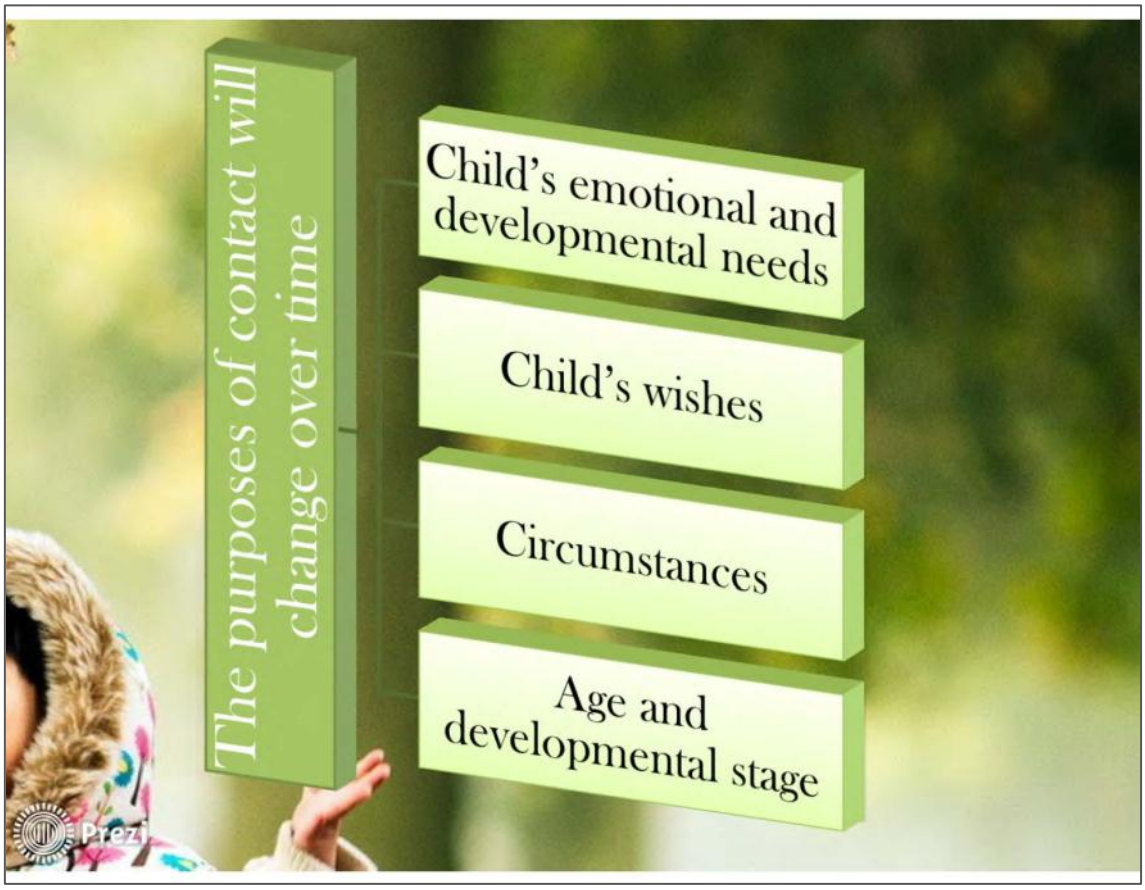
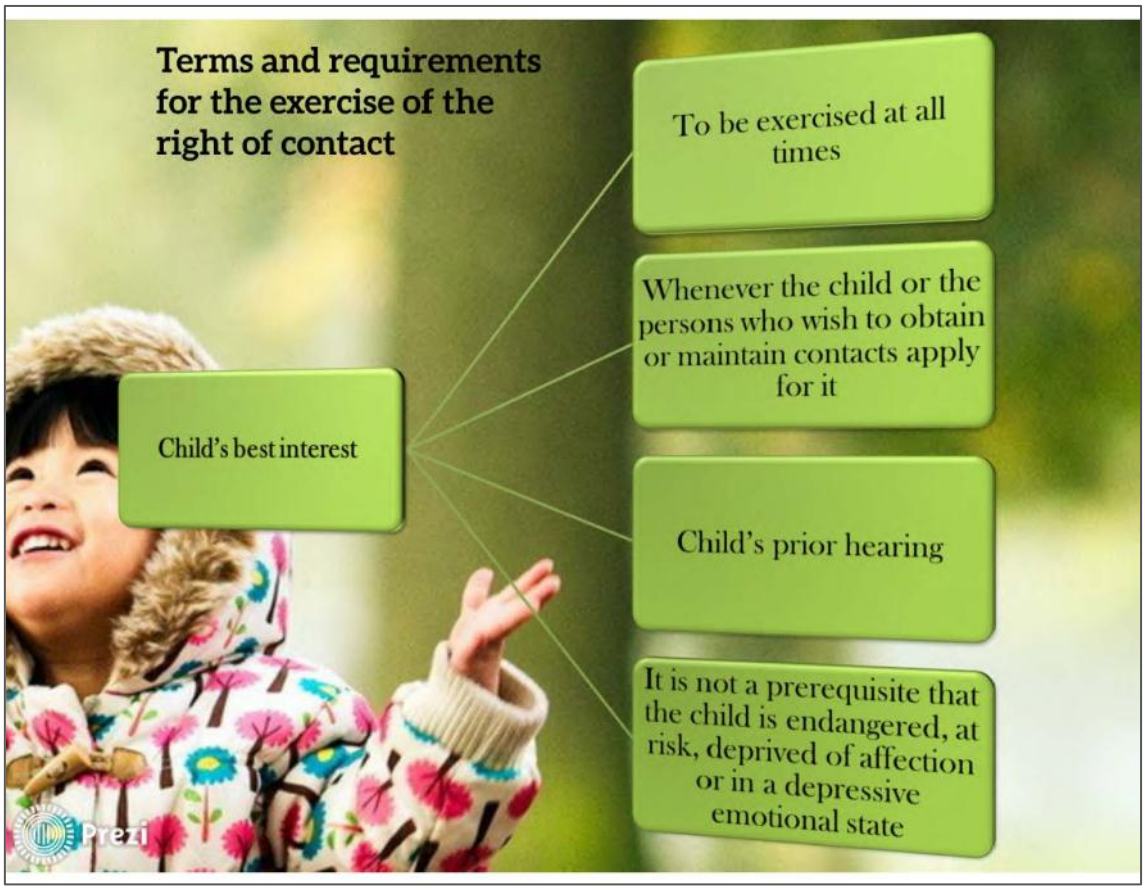
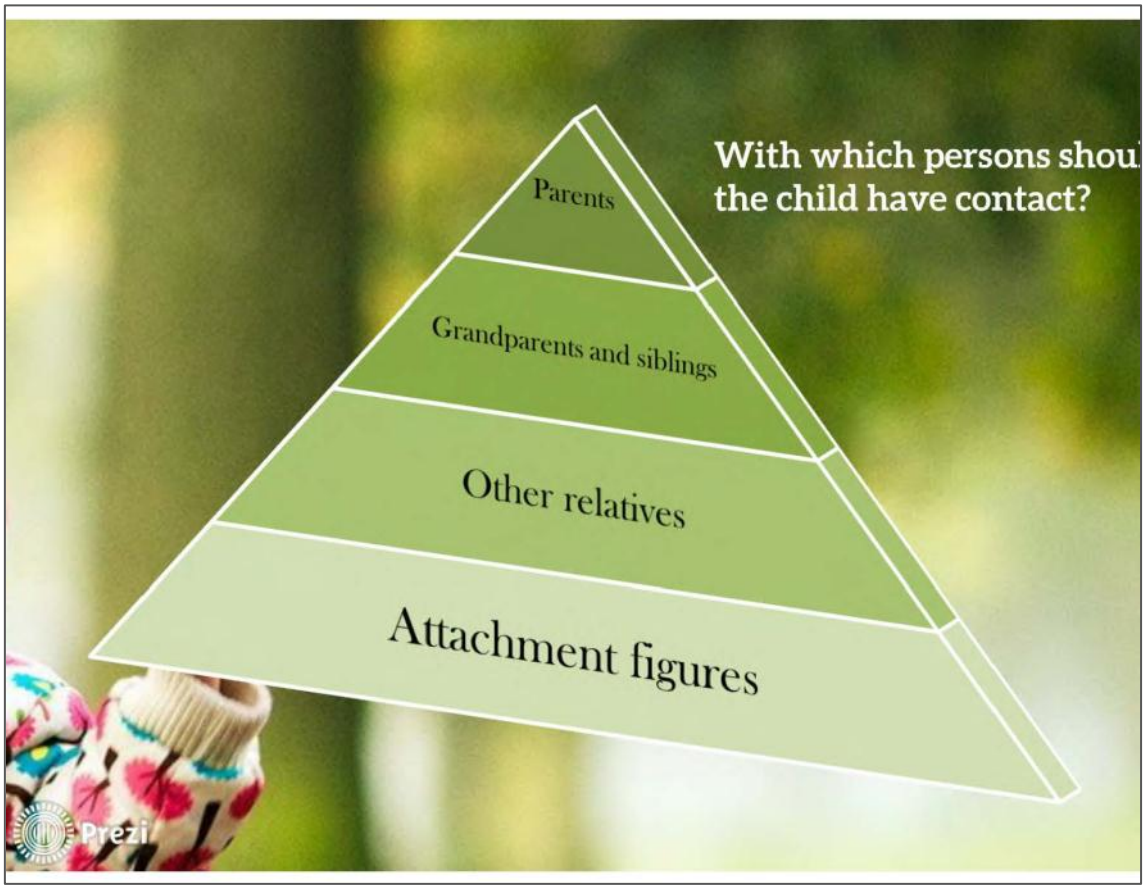
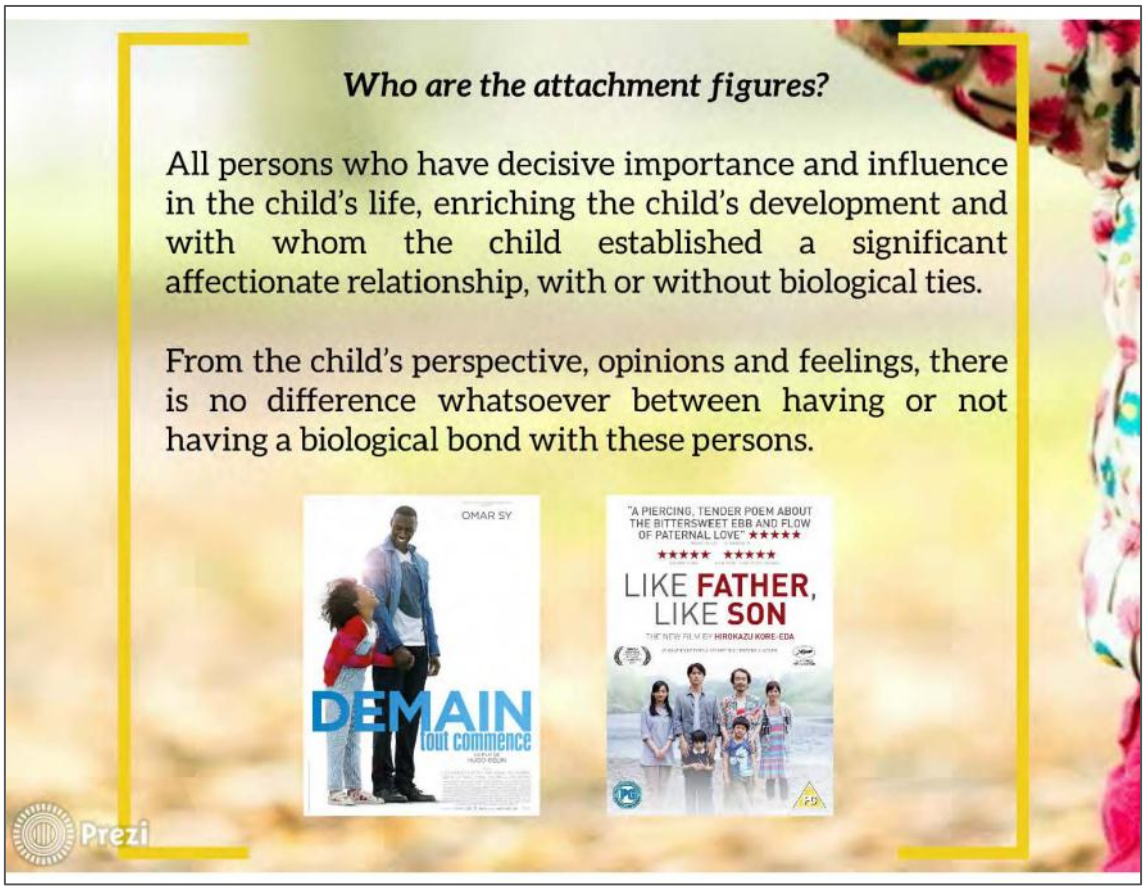
Child as a minor
Lack of capacity to exercise rights
Parents' responsibility to represent children
Special cases:
Purely Personal Rights
Right of contact
Prezi

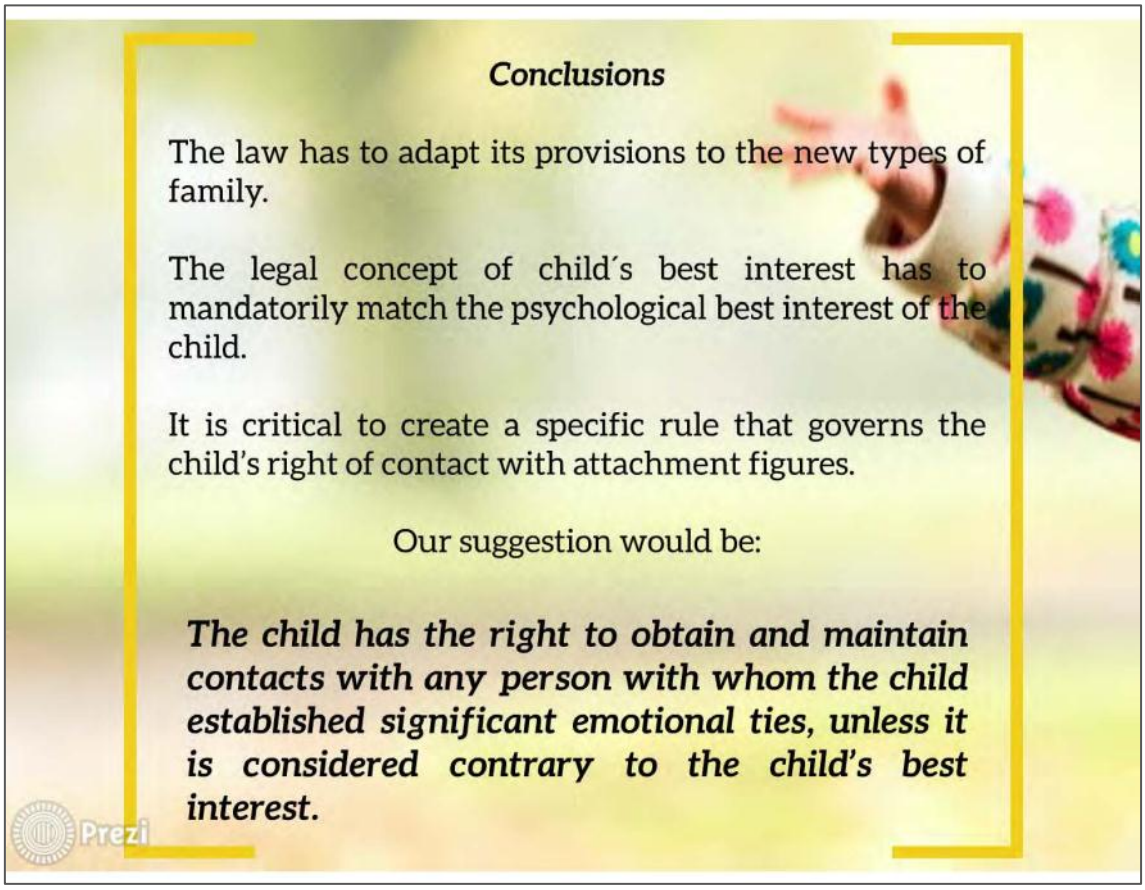

The purposes of contact
Sense of belonging
Social interactions
Physical and psychological growth and well-being
Love and care
Stability
Modelling of child's specific skills and abilities
Fuller and happier life
Prezi


The purposes of contact will change over time
Child's emotional and developmental needs
Child's wishes
Circumstances
Age and developmental stage
Prezi


Terms and requirements for the exercise of the right of contact
Child's best interest
To be exercised at all times
Whenever the child or the persons who wish to obtain or maintain contacts apply for it
Child's prior hearing
It is not a prerequisite that the child is endangered, at risk, deprived of affection or in a depressive emotional state
Prezi


With which persons shou
the child have contact?
Parents
Grandparents and siblings
Other relatives
Attachment figures
Prezi


Who are the attachment figures?
All persons who have decisive importance and influence in the child's life, enriching the child's development and with whom the child established a significant affectionate relationship, with or without biological ties.
From the child's perspective, opinions and feelings, there is no difference whatsoever between having or not having a biological bond with these persons.
OMAR SY
DEMAIN tout commence
"A PIERCING, TENDER POEM ABOUT THE BITTERSWEET EBB AND FLOW OF PATERNAL LOVE" ★★★★★
LIKE FATHER, LIKE SON
Prezi


Conclusions
The law has to adapt its provisions to the new types of family.
The legal concept of child´s best interest has to mandatorily match the psychological best interest of the child.
It is critical to create a specific rule that governs the child's right of contact with attachment figures.
Our suggestion would be:
The child has the right to obtain and maintain contacts with any person with whom the child established significant emotional ties, unless it is considered contrary to the child's best interest.
Prezi


European Charter of Child's Rights
Prezi


Thank you!
Prezi

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2.

2.2. SURROGACY: A CLASH OF COMPETING RIGHTS

With Particular Reference to the European Court of Human Rights

Case of Paradiso and Campanelli v. Italy

Team Portugal II

Filipa Redondo | Filipa Valente | Maria João Esteves

Accompanying Teacher

Maria Perquilhas

CENTRO
DE ESTUDOS
JUDICIÁRIOS

THEMIS 2017
Semi-Final B
International Judicial Cooperation in Civil Matters - European Family Law

SURROGACY: A CLASH OF COMPETING RIGHTS

With Particular Reference to the European Court of Human Rights Case of Paradiso and Campanelli v. Italy

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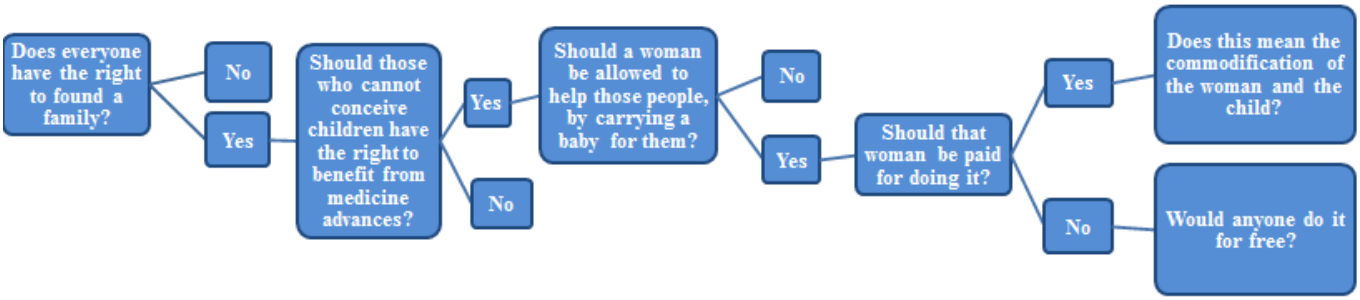
I. Introduction



"Thirty years after the first surrogate baby was born, courts across the world still struggle to work out the morality of childbirth transactions."[1]

Surrogacy is a present-day issue[2], which divides people and leaves no one impassive, because of the moral and ethical questions it raises – far beyond the medical point of view.[3]

We chose this subject because of its topicality and increasing importance. In fact, globalization, the medical achievements and declining fertility rates[4] have put this subject on the agenda.

[1] PREISS, Danielle, SHAHI, Pragati, "The Dwindling Options for Surrogacy Abroad", May 31st, 2016, available in https://www.theatlantic.com/health/archive/2016/05/dwindling-options-for-surrogacy-abroad/484688/.

[2] However, surrogacy is not a new reality. It exists since biblical times but it has increased in the last decade – Permanent Bureau of The Hague Conference on Private International Law (HCCH), "A Preliminary Report on the Issues Arising from International Surrogacy Arrangements", Preliminary Document No. 10, March 2012, page 6.

[3] Friedman and Squire (1998) identify surrogacy as the contemporary issue that encapsulates many of the moral ambiguities of our age – FRIEDMAN, Ellen G., SQUIRE, Corinne, "Morality USA", Minneapolis: U of Minnesota Press, 1998.

[4] E.g., in a worldwide perspective, the number of children born per woman was 2.8 in 2000; and in 2016 it decreased to 2.4. This is a problem which affects mostly industrialized countries. – Source: https://www.cia.gov/library/publications/the-world-factbook/geos/xx.html.

What is surrogacy, then?[5] It is a way of having children in which a woman – the surrogate – gets pregnant having already decided to give the child away to someone else, with whom she made an arrangement – the intending (or intended) parent(s). It is necessary to distinguish traditional surrogacy from gestational surrogacy. In traditional surrogacy, the surrogate provides her own genetic material (egg), and therefore the child born is genetically related to the surrogate. In gestational surrogacy, the surrogate does not provide her own genetic material, so the child born is not genetically related to the surrogate. Gestational surrogacy usually occurs following IVF treatment and the gametes may come from both intending parents, one, or neither.[6]

Also, it may be a commercial (for-profit) surrogacy arrangement or an altruistic (non-profit) surrogacy arrangement. In for-profit ones, the intending parent(s) pay the surrogate financial compensation[7] which exceeds her "reasonable expenses". In altruistic ones, the intending parent(s) pay the surrogate nothing or, more frequently, only her "reasonable expenses" related to the surrogacy. For understandable reasons, these kinds of altruistic arrangements most of the times (but not always) take place between intending parent(s) and a relative or a friend.

Our starting point was the Paradiso and Campanelli case. In fact, it is the ECtHR's most recent case law on this matter[8]. It is a very interesting case to analyze, since there was no biological link at all between the intending parents and the child, brought from a Russian clinic, which means this case dangerously approximates human trafficking. Furthermore, the Grand Chamber ruling was not only a reversal of the Chamber's decision, but also was held by eleven votes to six, which means it is a controversial case.[9]

Surrogacy gives rise to many issues, namely concerning the human rights of those involved in the process, in particular when we talk about for-profit cross-border surrogacy arrangements[10]. Indeed, we may question if we are not sliding into a sort of "children on demand" scenario: in fact, the intending parent(s) can choose[11] the surrogate, the egg donor and the sperm donor, through the selection of many of their traits. In addition, as long as there are many children waiting for an adoptive family, can we really argue that it is the right to found a family that is at stake?

Regarding all this, we will approach the subject of surrogacy from both ethical and legal perspectives, taking into account the implications caused by the fact that the approaches around the world – and even across Europe - are multiple and sometimes hardly compatible.

[5] The following definitions are based on the glossary prepared by the Permanent Bureau of The Hague Conference on Private International Law (HCCH) ("The desirability and feasibility of further work on the parentage / surrogacy project", Annex A of Preliminary Document No. 3B, April 2014).
[6] In this paper, we are mostly primarily looking at gestational surrogacy, which is currently the most common one, by far.
[7] For "pain and suffering" or only the fee charged by the surrogate mother for carrying the child.
[8] The Grand Chamber decision is from 24th January 2017.
[9] In fact, in the other surrogacy cases ruled by the Court summarized on chapter III the decisions were all unanimously held.
[10] See "circumventive reproductive tourism" in chapter IV.
[11] Some surrogacy clinics provide real women catalogues, displaying each surrogate or egg donor photos and features, such as hair and eyes colors and personality traits, and even their hobbies.

II. The Paradiso and Campanelli Case

a. Case Summary

Mrs. Donatina Paradiso e Mr. Giovanni Campanelli filed an application in the ECtHR concerning an alleged violation of Article 8 of the European Convention on Human Rights (referred as Convention from now on) by the Italian Republic. The applicants claimed that their right to private and family life was disrespected when the Italian authorities took a series of measures concerning the child T.C..

The applicants, a married couple, tried to be parents through medically assisted reproduction and, after the repeated failure of that method, they were authorized by the Campobasso Minors Court to adopt a foreign child. However, the couple never had news about a child eligible for adoption.

As result, they tried something different. Mrs. Paradiso went to a Moscow-based clinic and made a gestational surrogacy agreement with it. Allegedly, Mrs. Paradiso travelled to Moscow with Mr. Campanelli's seminal fluid, which was duly conserved, and handed over to the clinic. Therefore, the applicants stated that the two embryos implanted in the surrogate mother's womb on 19 June 2010 had genetic material from Mr. Campanelli. This was certified by the Russian Clinic on 16 February 2011.

The child was born in Moscow on 27 February 2011. The surrogate mother gave away any rights concerning the child to be born.

On 10 March 2011 the child was registered by the Registry Office in Moscow as the son of Giovanni Campanelli and Donatina Paradiso and on 29 April 2011 the Italian Consulate issued the documents enabling the child to travel to Italy with Mrs. Paradiso, which happened on 30 April 2011.

However, on 2 May 2011, the Italian Consulate in Moscow informed the Campobasso Minors Court, the Ministry of Foreign Affairs and the Colletorto Prefecture and Municipality that the paperwork concerning the child T.C. contained false information. Consequently, on 5 May 2011, the Public Prosecutor's Office opened criminal proceedings against Mrs. Paradiso and Mr. Campanelli and requested at the Campobasso Minors Court the opening of proceedings to make the child available for adoption. This request had a positive answer on the same day and a guardian *ad litem* (*curatore speciale*) was appointed to the child. On 16 May 2011, the child was placed under guardianship.

From this point forward, a judicial dispute started between the applicants and the Italian Public Prosecutor's Office, from which an extremely relevant fact has emerged: the court ordered DNA tests in order to establish if the second applicant was the child's biological father and the result was negative. After being confronted with the DNA tests results, the Russian clinic expressed its surprised and stated that it was not possible to identify how the error was made. Therefore, the child had no biological link to Mr. Campanelli and, has we already knew, to Mrs. Paradiso.

This was a crucial point for the Minors Court, as we can understand from its decision of 20 October 2011. The Court applied an immediately enforceable decision stating that the child should be removed from the applicants, taken into the care of social services and placed in a children's home. From the Court point of view, this was not gestational surrogacy, because "in order to be able to talk of gestational or traditional surrogacy (in the latter, the surrogate mother makes her own ovules available) there must be a biological link between the child and at least one of the two intended parents (in this specific case, Mr. Campanelli and Mrs. Paradiso), a biological link which, as has been seen, is non-existent".

Consequently, the applicants put themselves in an unlawful situation that could not be accepted by the Italian Authorities. To the court, the child was in a state of abandonment and it was essential to find him an adoptive family. The child has now been adopted.

b. Court's decision

The Chamber considered that the private life and family life of the applicants, protected by Article 8 of the Convention, had been violated. In this sense, the court decided that there was a *de facto* family life between the applicants and the child and, with the measure describe above, the Italian Authorities interfered without right to it in their family[12].

The Italian government appealed. The Grand Chamber of the ECtHR had two main questions to solve: whether Article 8 of the Convention is applicable; and, in case of a positive answer to the first question, whether the urgent measures ordered by the Minors Court, which resulted in the child's removal, amount to an interference in the applicants' right to respect for their family life and/or their private life within the meaning of Article 8 § 1 of the Convention and, if so, whether the impugned measures were taken in accordance with Article 8 § 2 of the Convention.

Concerning the question of the application of Article 8, the Court noted that the applicants and the child lived together for a short period of time ("six months in Italy, preceded by a period of about two months shared life between the first applicant and the child in Russia") which would be inappropriate to define a minimal duration of shared life necessary to constitute *de facto* family life.

The court noted as well that the quality of the bond and the existence of a parental project are relevant to define the existence of family life. However, in the present case, the absence of any biological tie, the short duration of the relationship with the child and the uncertainty of the ties from a legal perspective were determining factors that led the Court to state that there was not a *de facto* family life.

[12] The Chamber stated that when the Italian authorities decided to take the child from the applicants and place him under the care of the social services, they didn't reach a fair balance between the interests as stake, especially because they didn't preserve the best interest of the child. Actually, the child spent two years without an official identity. Therefore, the Court wasn't convinced that the Italian authorities respected the necessary conditions in order to justify the measures they take in this case.

But, as the case concerns the bonds created and developed between the applicants and the child, which pertains to individual's life and social identity, the Court concluded that the impugned measures pertained to the applicants' private life, making Article 8 applicable to the case.

As the measures interfered with the applicants' private life, they must be justified under Article 8 § 2 of the Convention. The Court considered that the interference was "in accordance with the law", as the application of the Italian law by the domestic courts was foreseeable. It was as also considered that the intention of reaffirming the State's exclusive competence to recognize a legal parent-child relationship, with a view to protecting children is a legitimate aim pursued by the measures.

Regarding the necessity of the measures in a democratic society, the Court stated that the public interests of child protection (as there was a careful analysis of the case) and law reaffirming (against the illegality of the applicants' conduct) were decisive and justified these measures.

In conclusion, the Court held, by eleven votes to six, that there had been no violation of Article 8 of the Convention.

III. Surrogacy – concept in European Court of the Human Rights

Only a few cases involving surrogacy[13] have been taken to the ECtHR and have been found admissible. Below, we can see the summarized facts of each one of these cases.

S.H. and Others v. Austria (Application No. 57813/00)

The applicants were two Austrian married couples whose wives were infertile. They wished to use medically-assisted procreation techniques, which were not allowed in Austria. The applicants complained that because of the Austrian Artificial Procreation Act there was a violation of their rights under Article 14 (prohibition of discrimination) read in conjunction with Article 8 (right to respect for private and family life) of the Convention. In November 2011, the ECtHR upheld the constitutionality of the Austrian Artificial Procreation Act. The Court decision was based on the wide margin of appreciation doctrine, because these cases concerned issues where there is no consensus in the European Union. The Court thereby applied Article 8 (and stated that there was no cause for a separate examination of the same facts from the standpoint of Article 14 read in conjunction with Article 8) and found that the procedural deference owed to the member state (Austria) outweighed the protections granted by these Articles. Despite the fact that it held that there had been no violation of Article 8 in the present case, the Court underlined in its decision that the subject of artificial procreation, because of its particular dynamic development in science and law, had to be kept under review by the Contracting States.[14]

[13] All these cases the Court has ruled concerned to gestational surrogacy, fruit of cross-border agreements.

[14] Concerning to this case, it is interesting to remember that the Chamber, in its judgment of 1st April 2010, originally found, regarding Austrian law, a violation of Article 14 of the Convention in conjunction with Article 8 both

Mennesson v. France (Application No. 65192/11) **and Labassee v. France** (Application No. 65941/11)

In these two similar cases, France refused the legal recognition to parent-child relationships that had been legally established in the United States, where surrogacy is legal. In both couples, the Mennessons and the Labassees, the wives were infertile, so they went to California and Minnesota respectively. Both embryos were formed with the sperm of the intending fathers and donated eggs.

The applicants, in both cases, complained specifically of the fact that France's refusal meant the detriment of the children's best interests. The ECtHR stated that in these cases Article 8 of the Convention was applicable in both its family life aspect and its private life aspect. Then, in both cases, the Court held that there had been no violation of Article 8 of the Convention concerning the applicants' right to respect for their family life. Yet, the Court held that there had been a violation of Article 8 concerning the children's right to respect for their private life, because of the aspect of the identity of individuals, which demands that, far as surrogacy is concerned, the margin of appreciation left to States needs to be reduced.

Foulon v. France (Application No. 9063/14) **and Bouvet v. France** (Application No. 10410/14)

The applicants were, in the first case, a French national and his daughter, born in Bombay, India, in 2009[15], and, in the second case, a French national and his twin sons, also born in Bombay, India, in 2010. These children were born through surrogate pregnancies and in both cases the applicants are the biological fathers of the children concerned.

Both these French nationals were facing the refusal to get the recognition in France of the parent-child relationship between them and the children in India. This occurred because the French authorities suspected that they had resorted to gestational surrogacy agreements, prohibited in France. Before the ECtHR, based on Article 8, the applicants alleged a violation of their right to respect for their private and family life as a result of the French authorities' refusal.

The Court held that there was no violation of Article 8 concerning the applicants' right to respect for their family life, but on the other hand held that there was a violation of Article 8 concerning the right to respect for children's private life.

It is interesting to note that the Court have always considered that these surrogacy cases fall within the scope of Article 8 of the Convention - right to respect for private and family life[16] - but has never considered that there has been a violation of this Article as regard its family life

in respect of the female applicants and the male applicants. So the Grand Chamber decision meant a reversal of the Court's prior position.

[15] It is impressive that in Foulon case the intended father paid a particularly low amount for the surrogacy agreement: € 1.300.

[16] In fact, "Article 8 is one of the most open-ended of the Convention rights, covering a growing number of issues and extending to protect a range of interests that do not fit into other Convention categories." – "Article 8 | Right to private and family life", UK Human Rights Blog: https://ukhumanrightsblog.com/incorporated-rights/articles-index/article-8-of-the-echr/.

perspective. On the other hand, when there were surrogate children involved, the Court considered that the refusal of legal recognition to parent-child relationships is a violation to the child's right to private life, which has motivated lots of reactions speaking out against a supposed "liberalization of surrogacy" by the ECtHR[17]. Since then, the Paradiso and Campanelli Grand Chamber's decision was rendered and the Court decided that there was not a violation of Article 8 of the Convention. Actually it does not mean necessarily a change of the Court's position, since in the case of Paradiso and Campanelli there isn't a biological link between the intending parents and the child, contrary to prior cases brought in front of the ECtHR.

We consider that the Court could have already taken these opportunities to adopt a clear position on this matter – regarding the whole issue of commercial surrogacy. In fact, "the Court failed to grasp the problem of surrogacy as a whole, or did not want to"[18], although a definitive position is required by all moral and ethical ties.

IV. Surrogacy: a comparative law summary for Europe

Regarding legal approaches to surrogacy in internal laws and policies, it is possible to identify three different categories: strict, permissive and unregulated. We will focus on the approach of some Contracting States of the Council Europe[19].

According to the ECtHR[20], seven[21] of the thirty-seven States have permissive legislation regarding surrogacy. Some of them permit commercial surrogacy and others only permit altruistic surrogacy. States may define eligibility criteria for intending parents and surrogate mothers, regulate the legal parentage of the child born as result of the surrogacy arrangements, define if the surrogacy arrangement is or is not enforceable and regulate who appears in the birth certificate.

In these States we can distinguish two different kinds of regulatory approaches: one where there is a pre-approval or post-approval system to engage in surrogacy; and other where the intended parents apply for the transfer of legal parentage after the child has been born. In the first type, the intending parents and the future surrogate mother have to present their arrangement to a designated body that verifies that the conditions of the legislation have been met and approves it prior to or after any medical treatment[22]. Thus, in some States, parental status can be transferred pre or postnatally to the intended parents without

[17] "The European Court of Human Rights (ECtHR) is progressively legitimizing surrogacy by a rapid succession of decisions each carrying further the liberalization of this practice and the logic of the right to a child." – PUPPINCK, Grégor, "The Liberalization of Surrogacy by the ECHR", European Centre for Law & Justice: https://eclj.org/surrogacy/the-liberalisation-of-surrogacy-by-the-echr.

[18] PUPPINCK, Grégor, "ECHR: Towards the Liberalization of Surrogacy Regarding the Mennesson v France and Labassee v France cases (n°65192/11 & n°65941/11)".

[19] Cross-border reproductive tourism is a worldwide reality (Europe, Australia, North and South America, Asia and Africa). India, which has been one of the most sought after countries, has recently taken measures to impose restrictions to foreigners and to guarantee surrogates' and child's rights. To know more, visit: http://www.prsindia.org/uploads/media/Surrogacy/Surrogacy%20(Regulation)%20Bill,%202016.pdf.

[20] The ECtHR proceeded to do comparative law research into different legal approaches related to surrogacy in thirty-five of the thirty-seven Contracting States, when assessing their judgment in *Labasse v. France*.

[21] Albania, Greece, the Netherlands, the United Kingdom, Georgia, Russia and Ukraine.

[22] Permanent Bureau of HCCH, Preliminary Document No. 10, idem, page 12.

bureaucracy. In the second type, we find a variation in whether or not the birth certificate mentions the surrogate at all or is there a mandatory waiting period for the gestational mother in order for her to waive her parental rights over the child[23].

Table 1 – *Comparison of permissive surrogacy laws in some Contracting States*[24]

Country	Ukraine[1]	Russia[2]	United Kingdom[3]
Type of surrogacy allowed	Commercial and altruistic.	Commercial and altruistic.	Altruistic.
Payment to the surrogate	No restriction.	No restriction.	Reasonable expenses excluding payment for the benefit of the surrogate.
Legal guardian of the surrogate child	The intending parents, from the moment of conception. Donor or a surrogate mother has no parental rights over the child.	The surrogate mother, if she has provided the egg. The intending parent(s), if the surrogate mother has not provided the egg.	Surrogate mother (the transferring of guardianship must occur through a court order, which application has to be submitted within six months of the child's birth, if the at least one of the intending parents is genetically related to the child and one of those is domiciled in UK, regardless that they must have at least 18 years old and must be married, civil partners or living together in an enduring family relationship; after that deadline or if there is not a biological link between the intending parent(s) and the child, only through adoption).
Registration of the child	The birth certificate is issued with the intended parents' names regardless of their genetic link to the child.	The intending parents can make a contract with the surrogate stating that, after the child is born, its birth certificate will have no mention of the surrogate mother. Otherwise, after the birth, the surrogate mother must give her consent to the registration of the intending parents as the child's legal parents.	In the birth certificate appears the surrogate mother's. Once the parental order is attained or the adoption is decreed, the birth certificate is replaced by one with the intending parents as legal parents and the name they have given to the child.
Imprisonment for engaging in commercial surrogacy	No provision.	No provision.	Maximum three months.
Eligibility criteria for intending parents			
Requirement of being married	Yes (only heterosexual couples).	No (single women and heterosexual couples, regardless of their marital status, allowed).	No (includes intending parents living in a civil partnership or living simply as partners).
Citizenship and/or residency	No requirement.	No requirement.	At least one of the intending parents must be a permanent resident in UK.
Existence of a medical reason	Yes.	Yes.	No requirement.
Eligibility criteria for surrogate mother			
Age	18-35 years.	20-35 years	Not specified.
Number of own children	At least one.	At least one.	No requirement.
Number of times one can be a surrogate	No restriction.	No restriction.	No restriction.

[23] RINTAMO, Sara, "Regulation of Cross-Border Surrogacy in Light of the European Convention on Human Rights & Domestic and the European Court of Human Rights Case Law", Master Thesis, Faculty of Law, University of Helsinki, April, 2016, page 21.

[24] BRUNET, Laurence, and others, "A comparative study on the regime of surrogacy in EU Member States", Directorate-General for internal policies, Policy Department C: Citizens' Rights and Constitutional Affairs, Study, European Union, 2013, pages 333-338.

Consent of the partner	No provision.	Required.	Not required. But the husband will be considered the legal father, irrespective of the biological relationships, unless it can be shown that her husband did not consent to the surrogacy arrangement.

1. Ukraine has signed but not yet ratified the Convention on Human Rights and Biomedicine.

2. Russia has not signed the Convention on Human Rights and Biomedicine.

3. United Kingdom has not signed the Convention on Human Rights and Biomedicine.

In some States[25] [26], surrogacy arrangements are expressly prohibited by law, usually on the basis that such agreements violate the surrogate mothers and child's human dignity, reducing both to mere objects of contracts[27] [28]. In several of these countries the parties will incur in criminal sanctions and, as far as the child is concerned, the surrogate mother will be considered its legal parent and often this is not contestable[29]. Other countries have opted for a total ban on surrogacy arrangements, whether commercial or altruistic. However, these circumstances do not mean that it cannot be recognize if obtained abroad[30].

The consequence of this kind of regulation is that surrogacy arrangements in contravention of the law are void and unenforceable. Therefore, the general rules related to legal parentage will apply to any child born as a result of such an arrangement[31].

[25] Germany, Austria, Spain, Estonia, Finland, Iceland, Italy, Moldova, Montenegro, Serbia, Slovenia, Sweden, Switzerland and Turkey.
[26] Actually, in Portugal, surrogacy is prohibited. However, a new law was published in 22.08.2016, permitting altruistic surrogacy under certain and restricted conditions but it has not entered into force because its implementation has not yet been published.
[27] See Article 21 of the Convention on Human Rights and Biomedicine, 1997. This Convention has not been signed and ratified by all Contracting States.
[28] Eg. Germany and Switzerland.
[29] Permanent Bureau of HCCH, Preliminary Document No. 10, idem, page 9.
[30] RINTAMO, Sara, idem, page 31.
[31] Permanent Bureau of HCCH, Preliminary Document No. 10, idem, page 9.

Table 2 – *Comparison of restrictive surrogacy laws in some Contracting States* [32] [33]

Country	Germany[1]	Italy[2]	Finland[3]
Type of surrogacy allowed	None (commercial, altruistic, traditional and gestational).	None (commercial, altruistic, traditional and gestational).	Neither commercial neither altruistic. But the traditional surrogacy is not expressly banned.
Legal guardian of the surrogate child	Despite being forbidden, the intending parents can adopt the child born through surrogacy under the following conditions: the consent of the surrogate, since the consent of the biological parents in general is mandatory, which cannot be given before the child is 8 weeks old. But they can only be able to adopt the child if it is necessary to its welfare: the court will decide case by case.	No legislative provision determines adoption as an instrument to allow the intending parents (in cases of international gestational surrogacy) to become legal parents.	No regulation for cases of international gestational surrogacy. It has been suggested that some analogous support and guidance could be drawn from provisions governing the choice of law in the Paternity Act.[34] In theory, adoption should be refused as surrogacy is forbidden in Finland, but the child's best interests suggest otherwise.
Imprisonment for engaging in commercial surrogacy	Three years' imprisonment.	Three months to two years' imprisonment and a fine.	No provision.

1. Germany has not signed the Convention on Human Rights and Biomedicine.

2. Italy has signed but not yet ratified the Convention on Human Rights and Biomedicine.

3. Finland has signed and ratified the Convention on Human Rights and Biomedicine, which entered into force in 01.03.2010.

Finally, in ten other Contracting States[35] there are no regulations on gestational surrogacy, and it is either prohibited under general provisions or not tolerated, or the question of its legality is uncertain. In addition to these countries, Belgium, Czech Republic, Luxemburg and Poland lack specific legislation, but have a tolerant approach to surrogacy[36].

The characteristics of this group of States are: surrogacy arrangements are not expressly prohibited and their terms are either expressly or under general law principles, void and unenforceable; in some States, commercial surrogacy is prohibited by criminal law, either by express provisions or because that these kinds of agreements contravene other related provisions (e.g. child trafficking); in others States, medical institutions facilitate altruistic

[32] BRUNET, Laurence, and others, idem, pages 267-276 and 294-301.
[33] RINTAMO, Sara, idem, page 33-36.
[34] RINTAMO, Sara, idem, page 35.
[35] Andorra, Bosnia-Herzegovina, Hungary, Ireland, Lithuania, Latvia, Malta, Monaco, Romania and San Marino.
[36] RINTAMO, Sara, idem, page 38.

surrogacy, within strict conditions. Once more, legal parentage will be determined by general laws, with the inherent difficulties for the intending parents.

Table 3 – *Comparison of some Contracting States which not regulate surrogacy* [37]

Country	Belgium[1]	Romania[2]
Type of surrogacy allowed	Due to the lack of a legal framework, altruistic and gestational surrogacy are authorized by some hospitals, which handle the surrogacy requests, under certain and restricted conditions.	Surrogacy is not expressly regulated. Nevertheless, the surrogacy issue could be indirectly looked at via medically assisted reproduction.
Contract	Not enforceable.	Not enforceable.
Legal guardian of the surrogate child	Surrogate mother and, if she is married, her husband. The intended mother has to engage an adoption procedure. The intended father has to acknowledge the child if the surrogate mother is not married and gives her consent. If the surrogate mother does not give her consent, a court tries to conciliate the parties and can reject the claim by the intended father in case conciliation is not attained and with the condition that it is proven that the intended father is not the biological father of the child. Moreover, the court can reject the acknowledgment if the child is a year or older and the acknowledgement is obviously against the child's best interests. If the surrogate is married, the intended father has to contest the paternal parentage of her husband or engage an adoption procedure to establish his own paternity.	Surrogate mother and, if she is married, his husband. Maternal filiation is not disputable, except when there has not been drawn up a birth certificate for the child. In this situation, filiation can be proven by possession of status. On the other hand, if the surrogate is married, the intended parent has to contest the paternal parentage of her husband or, in alternative, engage an adoption procedure[38]. For instance, if the surrogate mother refuses to give the child to adoption to the genetic parents, those can require a genetic test for establishing the genetic filiation with the child, which can be used as an objective proof in court.
Citizenship of the child	A child can acquire Belgian citizenship either on the basis of the nationality of his/her parents, or his/her birth on Belgian territory, or by the collective effect of an acquisition act.	A child can acquire Romanian citizenship either on the basis of the nationality of his/her parents, or his/her birth on Romanian territory.
Eligibility criteria for intending parents		
Requirement of being married	Usually, only heterosexual couples are accepted.	Not regulated.
Existence of a medical reason	Usually, sterility of the intended mother or her incapacity to complete a successful pregnancy.	If the medically assisted reproduction law could be considered as applicable, its granted to any woman or man suffering from sterility, that cannot be treated with a classic method of treatment or surgical intervention.

1. Belgium has not signed the Convention on Human Rights and Biomedicine.

[37] BRUNET, Laurence, and others, idem, pages 206-233 and 324-332.
[38] HOSTIUC, Sorin, IANCU, Cristian Bogdan, and others, "Maternal filiation in surrogacy. Legal consequences in Romanian context and the role of the genetic report for establishing kinship", Rom J. Leg Med [24] 47-51, Romanian Society of Legal Medicine, 2016, page 48.

2. Romania has signed and ratified the Convention on Human Rights and Biomedicine, which entered into force in 01.08.2001.

To sum up, the differences between States is one of the reasons for cross-border surrogacy. Indeed, in order to avoid the prohibitive or restrictive legal approaches to this matter in their own country, intending parents have to travel to others countries where surrogacy arrangements are allowed with fewer restrictions, which increase cross-border cases and this can be known as "circumventive reproductive tourism"[39]. However, there are others reasons as well: the lower costs or fewer perceived risks abroad (for example, risk of the surrogate reneging on the agreement). On the other hand, the increase of international surrogacy arrangements' numbers in some States is also related to the ready availability of poor surrogates[40].

It is also evident that the lack of regulation encouraged a vast lucrative business opportunities as well as potentially dangerous activities of intermediary agencies and specialized clinics[41].
In the midst of these heterogeneous legal approaches, surrogates and the newborn child are often "forgotten": many issues arise from the lack of regulation of their rights, welfare and security. We will discuss these questions further.

V. The clash of competing rights

a. The Intending Parents

Everything starts with the right to found a family, under Article 16 of the Universal Declaration of Human Rights (UDHR)[42]. This right also falls within the scope of Article 8 of the Convention (Right to respect for private and family life), as it is confirmed by the ECtHR decisions[43], and of Article 9 of the Charter of Fundamental Rights of the European Union (CFREU), which states the right to marry and the right to found a family[44].

Actually, surrogacy allows people who cannot conceive children – such as infertile and homosexual couples – and even a single person to access that fundamental right. This is of increasing importance if we bear in mind the declining fertility rate[45] and the fact that medical knowledge is so advanced that the odds of success in achieving a pregnancy are high. In fact, surrogacy may be justified by the recognized suffering caused by not reaching the

[39] VAN BEERS, B. C., "Is Europe 'Giving in to Baby Markets?' Reproductive Tourism in Europe and the Gradual Erosion of Existing Reproductive Markets", Medical Law Review, 2015 Winter;23(1):103-34.
[40] Permanent Bureau of HCCH, Preliminary Document No. 10, idem, page 7.
[41] "Call for Action 2016 – Urgent need for regulation of International surrogacy and artificial reproductive technologies", International Social Service, January 2016.
[42] "1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. (…) § 3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State." [our emphasis]
[43] ECtHR have been deciding that this right to found a family does not fall within the scope of the Article 14 (Prohibition of discrimination), even when it deals to a homosexual couple.
[44] "The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights."
[45] See endnote no. 4.

fulfillment of the dream of becoming a parent. On the other hand it can be argued that "longing for a child is agony, but so too is needing an organ transplant, yet we do not allow the indigent to earn money selling organs"[46], that is, the end does not justify the means.

It is also argued by the intended parents that the decision to procreate is an extremely private matter, so no interference of the state shall occur. However, "the assumption will prove to be false in almost all cases but one; if procreation follows from so-called natural processes. In case of any complications in procreation, there will be legislation involved in defining the framework within which individuals can obtain services to fulfil their innate desire to become a parent." So, the privacy argument seems to be fallacious especially since "legislation in reproductive matters tends to be even more value-bound than most legislation".[47]

As regards the intending parents' rights, there is a key issue that we need to address. Since the unborn surrogate baby is their child, they are required to look after its health. So, are the intending parents allowed to restrict and impose conducts on the surrogate mother?[48] There is a clash of competing rights: the intending parents' right to protect their unborn baby's health (or even life, if we consider the possibility of abortion) *versus* the surrogate's freedom and self-determination. We consider that the answer is: a surrogate mother's fundamental rights should not be limited. Contrary to other types of contracts, in surrogacy there are fundamental human rights involved, so the contractual freedom must be reduced. We do not forget the intending parents' right to protect their unborn child, but we believe that the surrogate's freedom and self-determination must never called into question, not least because we must remember that it was the intending parents who chose to use surrogacy (and chose that specific woman to carry their baby), with the constraints involved.

Now this leads us to another question – does the right to found a family really mean that there is a reproductive right? The answer is: probably, not. Because the truth is that someone, even when struggling with infertility, or a homosexual couple, can find a family through adoption. Furthermore, even the right to found a family seems not to be absolute: the ECtHR reiterates that "Article 8 protects an existing family rather than a hypothetical or desired family"[49]. In other words, "despite compassion for the unmet longing to be a parent, there is no right to a child for anyone — heterosexual, homosexual, or singles by choice"[50].

Another question arises from the intended parents' point of view. What if, after the birth, the surrogate mother decides not to give them the child? If the child has a biological link with one or both of the intended parents and none with the surrogate[51], it would probably not be difficult for them to get the child – also according to Article 9 § 1, of the United Nations Convention on the Rights of the Child (UNCRC)[52]. However, if that link does not exist[53], it can

[46] RIBEN, Mirah, "Dissident Voice", 30th May 2015 – http://dissidentvoice.org/2015/05/human-factory-farming-and-the-campaign-to-outlaw-surrogacy/.
[47] RINTAMO, Sara, idem, page 7.
[48] See Chapter V., b).
[49] European Centre for Law and Justice, "Surrogate Motherhood: a Violation of Human Rights" - report presented at the Council of Europe, Strasbourg, 26th April 2012.
[50] RIBEN, Mirah, idem.
[51] Assuming we are not talking about traditional surrogacy, which today is rare.
[52] "States Parties shall ensure that a child shall not be separated from his or her parents against their will (…)".

be highly problematic for the intending parents. The question then must be decided according to two different values: the child's best interest and the public interest in fighting human trafficking and not according to intended parents' interests. In fact, we cannot agree with this statement: "What would the intended parents do in a situation where both the egg and sperm are donated by a donor? Should that child not return to his intended parents who spent tens of thousands of dollars to have a child of their own? Clearly, the answer is no."[54] Actually, we feel that this would not be the right way forward when the issue of the amount spent by the intending parents is a decisive argument.

Some of those who endorse surrogacy state that the intended parents are "'reproductive refugees', boxed out of reproductive rights in their own countries, [which chase] them through others"[55], adding that "it's a constant chase" because they have to run from the countries that used to allow commercial surrogacy and progressively are now tending to ban it. The obvious counter argument is: why is that global movement in which national legislations tend to ban for-profit surrogacy or strongly limit its requirements[56]? That is because the profound ethical and human rights questions involved, and the questionable morality of the commercial surrogacy agreements, are becoming clearer.

b. The Surrogate mother

To fulfill the dream of the intending parents of having a child, the surrogate is the one who plays the principal role[57].

One cannot forget that, as a human being, she has fundamental rights that cannot be violated or even put at risk. Then, can we say that surrogacy arrangements respect surrogate fundamental rights?

The UDHR sets outs in Article 1 that "all human beings are born free and equal in dignity and rights". The CFREU also sets out in Article 1 that "Human dignity is inviolable. It must be respected and protected". In its turn, Article 3 establishes that "1. Everyone has the right to respect for his or her physical and mental integrity. 2. In the fields of medicine and biology, the following must be respected in particular: (…) the free and informed consent of the person concerned, according to the procedures laid down by law, (…) the prohibition on making the human body and its parts as such a source of financial gain".

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[53] As in the Paradiso and Campanelli Case.
[54] Journal of International Business and Law, Volume 14 | Issue 1, Article 4, 1st January 2015.
[55] PREISS, Danielle, SHAHI, Pragati, idem.
[56] Take the very recent example of India, which used to have one of the world's biggest surrogacy industries. See endnote no. 20.
[57] "It is now possible for a woman to become pregnant as a result of nine different combinations of possible use of eggs and sperm: (a) the egg and sperm of a commissioning heterosexual couple; (b) the egg of a commissioning woman and donor sperm; (c) the egg of a donor and the sperm of a commissioning male (be he part of a couple or a single person); (d) both donor egg and sperm (unrelated to the commissioning person(s)); (e) the egg of a donor and sperm from the surrogate's partner; (f) her own egg and the sperm of a commissioning male; (g) her own egg and the sperm of a donor; or (h) her own egg and the sperm of her partner. (a)–(e) entail some form of 'gestational' surrogacy, in which the woman is not genetically related to the child; (f)–(h) entail what is often referred to as 'traditional' surrogacy, as the woman is genetically related to the child." (ALLAN, Sonia, "The Surrogate in Commercial Surrogacy: Legal and Ethical Considerations", in "Surrogacy, Law and Human Rights", edited by GERBER, Paula, O'BYRNE, Katie and contributors, Routlegde Taylor & Francis Group, 2015, Chapter 7, endnote 21).

Regarding the application of Biology and Medicine, the Convention on Human Rights and Biomedicine sets in its Article 21 that "The human body and its parts shall not, as such, give rise to financial gain."

When a woman enters into a surrogacy arrangement[58] as a surrogate, her human dignity may be at risk[59]. Firstly, the surrogate is seen as a way to reach the intending parents' goal. In gestational surrogacy, her role is to provide a service to the intending parents[60]: her body and, more precisely, her womb is used as a true instrument/object. Secondly, as we mentioned above, frequently the intending parents impose conducts on the surrogate (for example, imposing restrictive diets or a different lifestyle, prohibiting the surrogate from consuming alcohol, having sexual relations, playing sports, etc.), that violate the surrogate's freedom and self-determination. Furthermore, the pregnancy can have repercussions on surrogate's private life (for example: as she cannot hide a pregnancy easily, she will be obliged to explain her situation; if she has other children, her pregnancy will have impact on them, as they witness their mother carrying a baby who she will give away to someone else; etc.). Also, during the proceedings of fertilization and the pregnancy, the physical integrity of surrogate can be compromised, for instance as they run sampling tests, amniocentesis or vaginal intra-sound. In case of complications, there is a high probability that her life is relegated to second place, because the child's life is the main concern[61]. In addition to this, it is known that there is a risk of maternal mortality for women who are implanted with other women's eggs.

As Sonia Allan[62] refers, "regardless of genetic connection, the gestational mother provides many biological resources during the pregnancy". Indeed, during the pregnancy a physical connection between the woman and the fetus is established and, as far as the woman is concerned, there is also a psychological connection with the baby.

Often, surrogates are poor women with deficient education, so social and financial pressures frequently lead women to enter into a surrogacy arrangement. This gives rise to another issue: the surrogate is an autonomous and willing part of the arrangement but she is often left without any kind of legal assistance. For this reason, the surrogate may not give a conscious, free, voluntary and informed consent, which is required. In other words, the surrogate is frequently more susceptible to manipulation. For example, a woman can be dazzled by a large sum of money, without realizing the physical and/or psychological effects of being a surrogate[63].

In for-profit surrogacy it is evident that the surrogate is using her body for financial gain, which is prohibited by international legal instruments (as we saw above), resulting in the

[58] In Germany, it has been concluded that surrogacy is an illegal adoption that "violates the child's and mother's human dignity and reduces both to objects of commercial contracts" (ALLAN, Sonia, idem, endnote 13).
[59] Positions more extremely about surrogacy compares it to prostitution, as they consider that is a way of explore the human body for financial gains.
[60] ALLAN, Sonia, idem, subtitle A. "Is the Surrogate Involved in the Sale or Commodification of Children?".
[61] For instance, the surrogate has the right to terminate her pregnancy in such cases? And if the fetus suffers some deformation? These and others questions can emerge from infinitive possibilities which can emerge from problems arise during the surrogate's pregnancy.
[62] ALLAN, Sonia, idem, subtitle A. "Is the Surrogate Involved in the Sale or Commodification of Children?".
[63] ALLAN, Sonia, idem, subtitle D. "Commercial Surrogacy Agreements: Reduced Bargaining Power and Lack of Informed Consent".

commodification of the child. In non-profit surrogacy cases, it could be argued that there is no violation of human dignity nor is there the commodification of the child, but as long as the intending parents pay the reasonable expenses of the surrogate, there is always the risk that the payment is being used to hide a real commercial surrogacy.

Furthermore, we must note that surrogate mothers are also at risk of human trafficking and exploitation. Indeed, the absence of uniform world-wide legislation increases "fertility tourism", as a global market, and frequently leads to exploitation, human trafficking and violence against the surrogates who are economically, socially or legally disadvantaged, as they are used for the profit of agents or brokers.

c. The child

Surrogacy is entirely devised for one goal: to give someone, or a couple, the opportunity of having a child. Consequently, most of the discussion over the subject was centered on harmonizing all the concerning rights and interests, as well as the complex problems brought by this triangular relationship. However, because of the very objective of surrogacy, we cannot stop questioning ourselves: what about the child?

As we know, children are especially protected by the law, due to the fact that they are human beings in development and, therefore, in need of special care and attention by States and the Society in general[64].

In order to fulfil this concern, the UNCRC guarantees all children the right to life (Article 6 § 1 UNCRC), to be registered immediately after birth, to have a name, to acquire a nationality and the right to know and be cared for by their parents (Article 6 § 1 UNCRC). Furthermore, the Convention recognizes children's right to preserve their identity (nationality, name and family relations) and to their private and family life (Articles 8 and 16 UNCRC). Finally, it is important to highlight children's right to not be separated from their parents against their will, except in some circumstances specified in the Convention (Article 9 UNCRC).

Furthermore, and as a general and primordial principle, the Convention States that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration" (Article 3 UNCRC), which implies that the main focus in the surrogacy arrangements must be the best interest of the child.

Arriving at this stage, we must ask ourselves: what is the best interest of the child in surrogacy cases? In fact, there is not merely one answer to this question. It all depends on the circumstances of the case. For example: is there a biological link between the child and the surrogate mother?; is the biological material used in the process provided by the

[64] Article 25 § 2 UDHR "Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection."

intended parents or from external donors?[65]; does the child have any health issues?; is the child's birth the result of an international surrogacy agreement?.

All these singularities must be accounted, for, as mentioned above, they carry many risks of children's rights violations which are not directly covered by the national laws.

The following list has some examples of situations that can put the child in a legal limbo:

- When the intended parents change their mind and they do not want the child, an abortion is not anymore possible or the surrogate mother does not want to do it…
- When the surrogate mother does not take care of her health and she is risking the child's health…
- The intended parents do not want the child anymore, because of some medical problem or because the surrogate mother gave birth to twins and the intended parents just want one child…
- The surrogate mother does not want to give the child away to the intended parents…

What can be done?

In these types of situations children are exposed to the risk of being victims of abandonment or of abuse, becoming stateless[66] or not having a legal parentage established[67]. Even more, children face the astounding danger of being victims of human trafficking[68], and that happens because children can be seen, in these agreements, as objects, to be produced and handed over to the intended parents for a sum of money[69].

Unfortunately, these risks are not just hypothetical scenarios. These regretful situations happen all over and some cases became widely known. The "Baby Gammy Case"[70] shocked the public, especially because a child with a deficiency was involved, as did the "Manji Case"[71] and the "Balaz Twins Case"[72]. Also, in Thailand, it was discovered that a Japanese

[65] The more genetic links the participants have with the child, the more complicated is to find a fair point of balance between their expectations concerning the legal parentage.
[66] This is expressly prohibited by Article 7 UNCRC.
[67] SUTTER, Petra de, "Report of the Committee on Social Affairs, Health and Sustainable Development", Parliamentary Assembly of Council of Europe, 23rd September 2016.
[68] This is expressly prohibited by Article 35: "States Parties shall take all appropriate national, bilateral and multilateral measures to **prevent the abduction of, the sale of or traffic in children for any purpose or in any form**."
[69] "Because the ultimate purpose is the production of a child through the commodified services of a surrogate's reproductive ability and because there is an exchange of payment for the child, the argument is that commercial surrogacy is, in fact, the sale of children." – CHOUDHURY, Cyra Akila, "The Political Economy and Legal Regulation of Transnational Commercial Surrogate Labor", Vanderbil Journal of Transnational Law, January 2015, Vol. 48, no. 1, page 13.
[70] ACHMAD, Clair, "How the Rise of Commercial Surrogacy is Turning Babies into Commodities", The Conversation, 25th December 2014.
[71] CHOUDHURY, Cyra Akila, "Transnational Commercial Surrogacy: Contracts, Conflicts, and the Prospects of International Legal Regulation", Oxford Handbooks Online, December 2016, page 7 and 8.
[72] CHOUDHURY, Cyra Akila, idem, page 8 and 9.

man had fathered at least sixteen children through surrogacy arrangements, which raised suspicions of child trafficking.[73]

In the Paradiso and Campanelli case, the intending parents tried to build their family through an illegal act against public order. Due to the particularities of the case, especially the lack of a biological link with the intending parents, the Italian Courts were very suspicious about what really happened in Russia. The child lived in an institution for a while before he was entrusted to a foster family and then adopted. Therefore, this is another example of how surrogacy arrangements can leave the child in a very ungrateful situation.

What if everything went smoothly? That is, the child is with the intended parents, legal filiation was successfully established, the surrogate mother didn't want to be part of the child's life and this new family is like any other? Are the child's rights still at stake?

The lack of a genetic and gestational link doesn't seem to lead to a lower level of affection or to a parent/child relationship that is less positive than those created through "natural" parenthood.[74] Actually, "findings from the preschool phases of the study predicted more positive motherchild relationships in surrogacy than in natural conception families."[75]

The child does not face a greater risk of having its human rights violated because of the lack of genetic or gestational link between him and his parents. Indeed, the potential exposure of the child to human rights violations is more likely to happen during the gestation period and immediately after his birth, as explained before. If the surrogacy arrangement is respected by everyone and the State recognizes the parenthood without any legal problems, then the child is completely integrated in his or her family.

However, there is a right that remains in jeopardy: children's right to know their origins. Indeed, all human beings have the right to know their biological history and this may be very important to guarantee not only health issues but also psychological and sociological balance[76]/[77].

In fact, in surrogacy arrangements, even more in international ones, there is a serious possibility that the child cannot access information related to the donors, for instance, or the surrogate mother. Even if the donors are the intended parents, one cannot say that the right to know the origins is fulfilled if the child doesn't know that a surrogacy arrangement

[73] BERTRAND, Brad, "Shifting Surrogacy Laws Give Birth to Uncertainty", Nikkei Asian Review [Singapore], December 2015, page 1.
[74] "The growing body of research on other nontraditional family forms indicating that family structure in itself does not have an adverse effect on family functioning similarly led to the expectation that the surrogacy families would not differ from the egg donation or natural conception comparison groups." – GOLOMBOK, Susan and others, "Families created through surrogacy: mother-child relationships and children's psychological adjustment at age 7", September 2011, page 3.
[75] Idem.
[76] "Having their right to know their origins violated, with the attendant possible negative psychological (and even physical) repercussions." - SUTTER, Petra de, idem.
[77] "Several members of the Group noted the importance of children knowing their origins, which some characterized as a right, and the preservation of records." See paragraph 25 of the "Report of the experts' group on the parentage / surrogacy project", meeting of 31th January to 3rd February 2017.

preceded its birth. However, we cannot minimize the surrogate right to privacy, which should be fairly balanced with the child's rights.

VI. Conclusion

We can conclude that we are openly against for-profit surrogacy. Indeed, as long as it increases the risks of surrogate mothers to exploitation, human trafficking and the commodification of women and children, the for-profit surrogacy runs counter to the most fundamental human rights, which are universally acknowledged in positive law.

We are also clearly against traditional surrogacy. In fact, we cannot even see how the possibility of a woman giving away her own child, on the basis of a contract, could be defended.

We feel that this is the right way to go when even countries that used to be the "surrogacy heavens", like India, Thailand, Nepal and Cambodia, are restricting, or even banning, access to surrogacy arrangements, due to all the ethical and moral questions arising from commercial surrogacy and the inherent risk of human rights violations.

Furthermore, we reiterate what we have already stated above: there is no right to a child for anyone. Therefore, there is not a fundamental right that can be opposed to this understanding.

As regards non-profit surrogacy, we acknowledge that some risks still exist in this kind of surrogacy. Namely, the risk of the following situations: the intending parents imposing conducts on the surrogate mother; possible health problems arising from the surrogate pregnancy; the rejection and the abandonment of the child leading to cases of stateless children; the disrespect of child's right to know his or her origins.

However, we consider that the total prohibition of any kind of surrogacy is not the best solution nor is it the most efficient answer to the current reality. Why? Firstly, the surrogacy ban could lead to the existence of underground services, with all the emerging and increasing risks to all parties involved. Secondly, we are aware that every country is free to adopt its own laws and policies and, therefore, the "circumventive reproductive tourism" would still be an issue.

Allowing the non-profit surrogacy and trying to avoid the mentioned risks mean that States must have a very careful legislation. The existence of such legislation would be essential to Courts, providing them with the necessary instruments to resolve the legal and ethical questions that surrogacy raises.

Therefore, it is our belief that the following points should be provided for in any legislation:

1) Surrogacy should be permitted only in certain cases, such as where there is a lack of uterus or an injury or illness related to it that absolutely and definitively rules out the chance of pregnancy;

2) The child must have a genetic link with, at least, one of the intending parents and must not have any genetic material from the surrogate mother;

3) Prior and subsequent to consent, medical, psychological and legal support to all the parties (intending parents and surrogate mother) must be provided. In sum, both parties should have all the relevant information about the surrogacy arrangement;

4) The consent from both parties has to be voluntary, free and informed, which will be facilitated by the support described above;

5) The surrogacy arrangements must be approved and followed by an independent body, such as an ethics committee;

6) The contract must be as comprehensive as possible. Namely, what should be done in cases of fetal malformation and cases of danger to the surrogate mother's health, as well as the possibility or not of abortion, have to be in the contract;

7) The intending parents cannot impose conducts on the surrogate mother;

8) Payment must be restricted to medical expenses, duly inspected by the State and proved by documents;

9) If the procedure succeeds, the intending parents must legally be considered the child's parents;

10) The child should have the right to know his or her origins;

11) The surrogate mother should have the right to refuse to be a part of the child's upcoming life;

12) There must be criminal penalties for those who do not respect the previous restrictions.

Beyond national regulations, an international Convention must be celebrated to help the States deal with the cases of international surrogacy agreements. Such a project has been studied and progressively put into place by the Hague Conference on Private International Law (HCCH)[78].

In conclusion, the international community's awareness must be raised as regards all these ethical questions and the subsequent need for regulation. As stated by the HCCH on March 2012 "The number of international surrogacy arrangements appears to be growing at a rapid pace and while some States are attempting to resolve the problems arising as a result, this global phenomenon may ultimately demand a global solution. There is no doubt that the current situation is far from satisfactory for the States and parties involved and, most

[78] To access all the HCCH's work, see https://www.hcch.net/pt/projects/legislative-projects/parentage-surrogacy. Especially, pages 16 and 17 of the HCCH background note for the meeting of the experts' group on the parentage / surrogacy project, February 2016.

importantly, for the children born as a result of these arrangements. There is a real concern that the current situation often fails to adequately ensure respect for children's fundamental rights and interests."[79]

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[79] Permanent Bureau of HCCH, Preliminary Document No. 10, idem, page 30.

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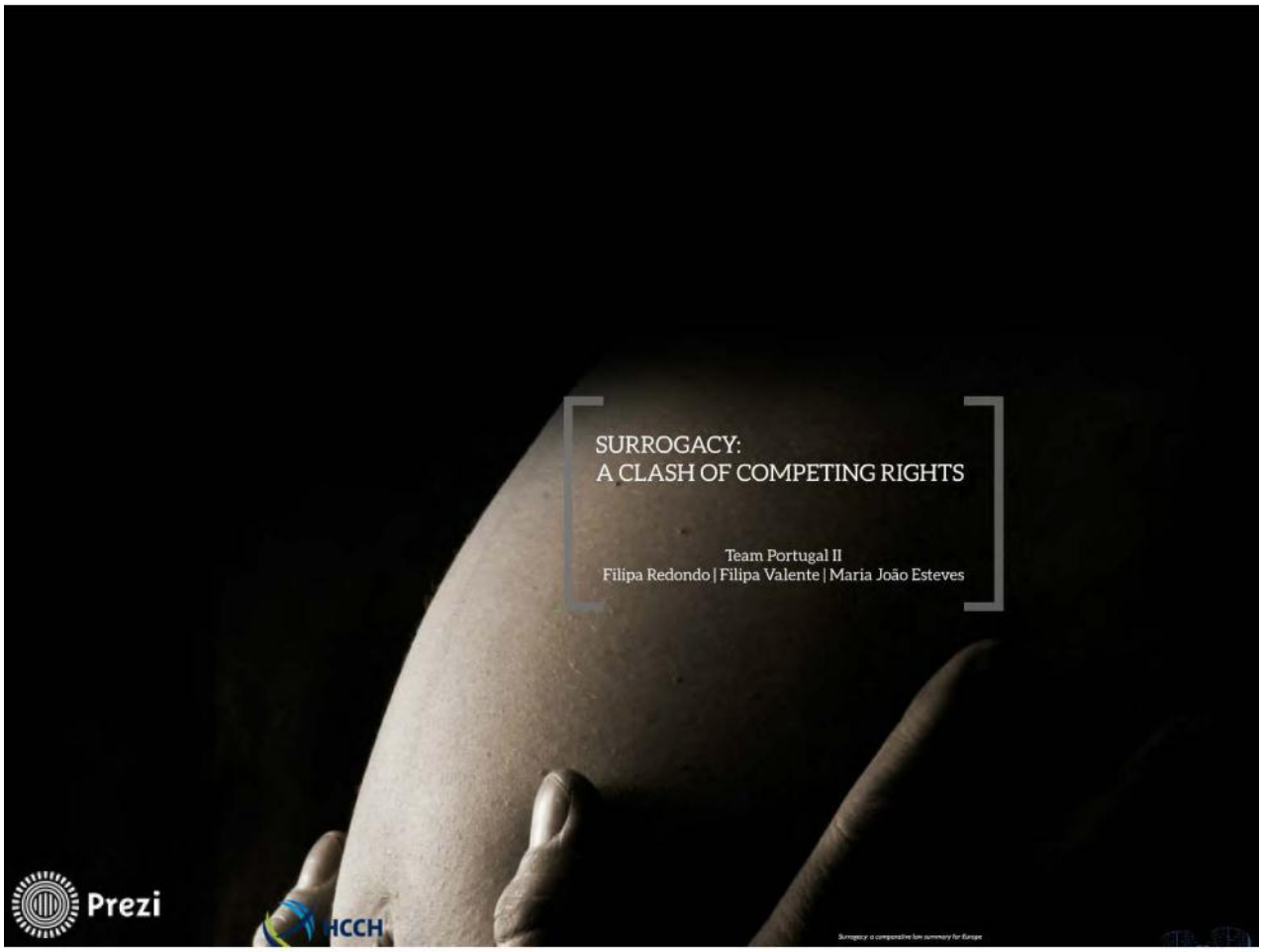
SURROGACY:
A CLASH OF COMPETING RIGHTS
Team Portugal II
Filipa Redondo | Filipa Valente | Maria João Esteves
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HCCH


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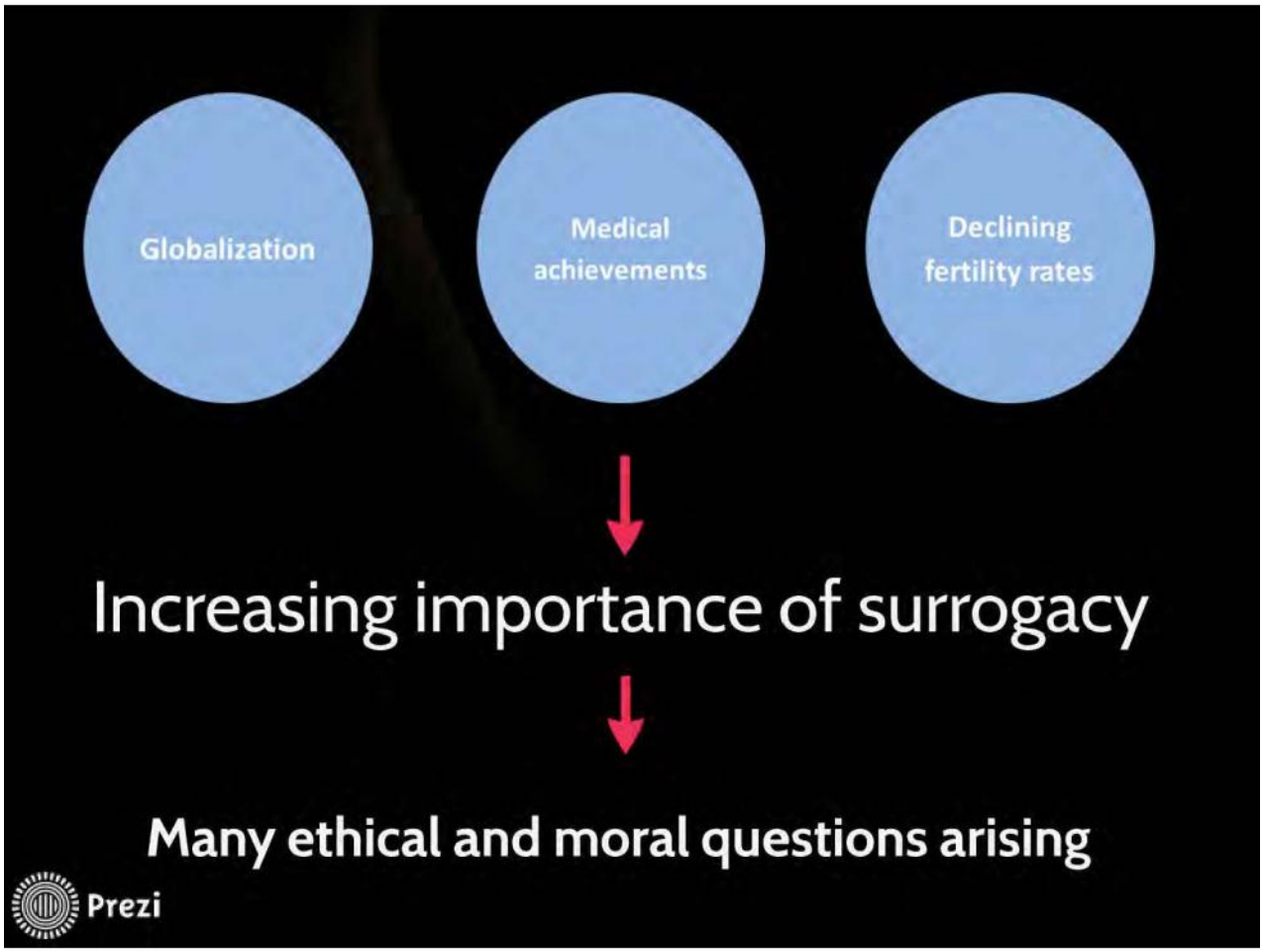
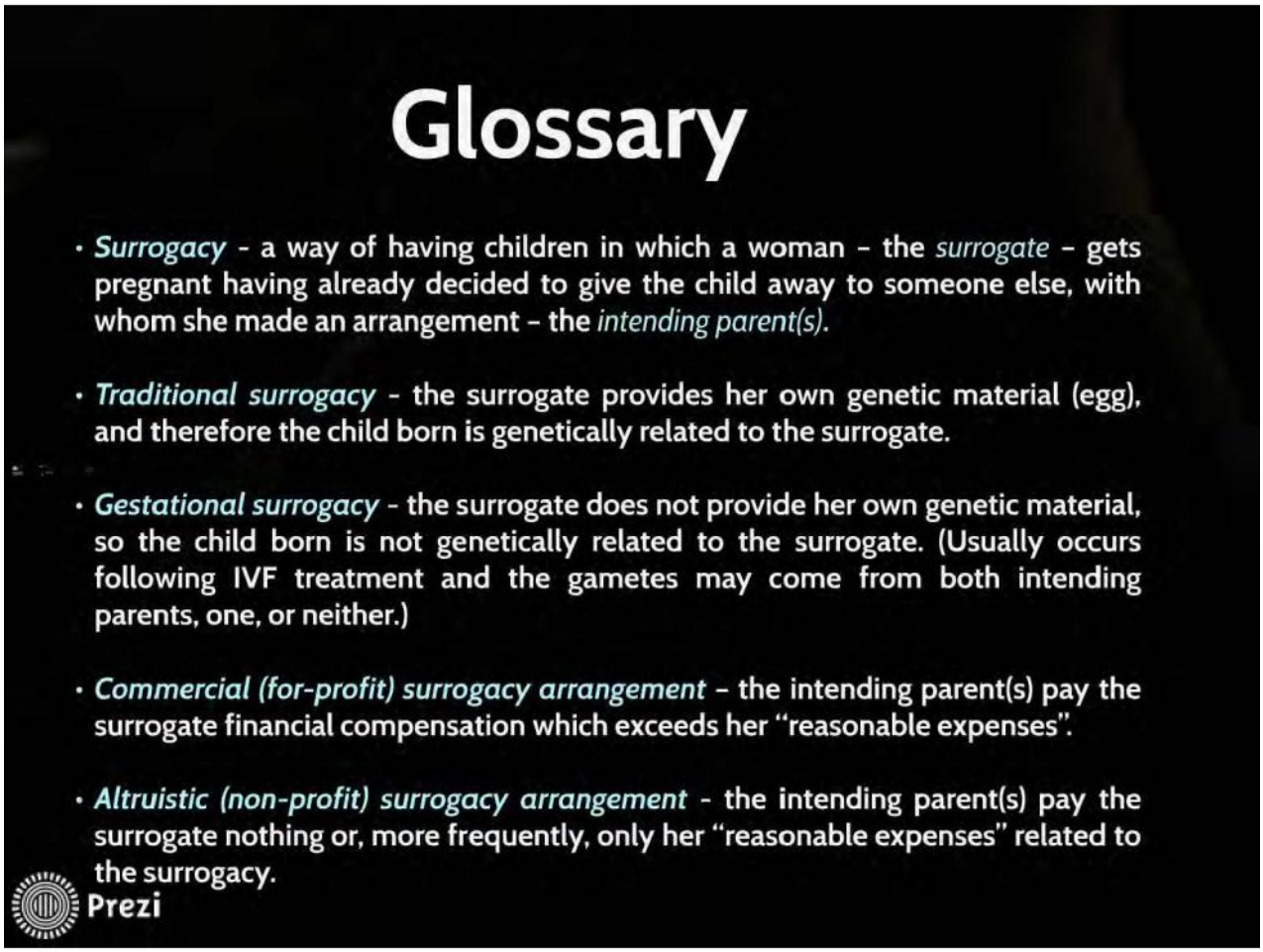

Globalization
Medical achievements
Declining fertility rates
Increasing importance of surrogacy
Many ethical and moral questions arising
Prezi


Glossary
• Surrogacy - a way of having children in which a woman – the surrogate – gets pregnant having already decided to give the child away to someone else, with whom she made an arrangement – the intending parent(s).
• Traditional surrogacy - the surrogate provides her own genetic material (egg), and therefore the child born is genetically related to the surrogate.
• Gestational surrogacy - the surrogate does not provide her own genetic material, so the child born is not genetically related to the surrogate. (Usually occurs following IVF treatment and the gametes may come from both intending parents, one, or neither.)
• Commercial (for-profit) surrogacy arrangement – the intending parent(s) pay the surrogate financial compensation which exceeds her "reasonable expenses".
• Altruistic (non-profit) surrogacy arrangement - the intending parent(s) pay the surrogate nothing or, more frequently, only her "reasonable expenses" related to the surrogacy.
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Starting point
European Court of Human Rights Case of
Paradiso and Campanelli v. Italy
Grand Chamber decision: 24th January 2017
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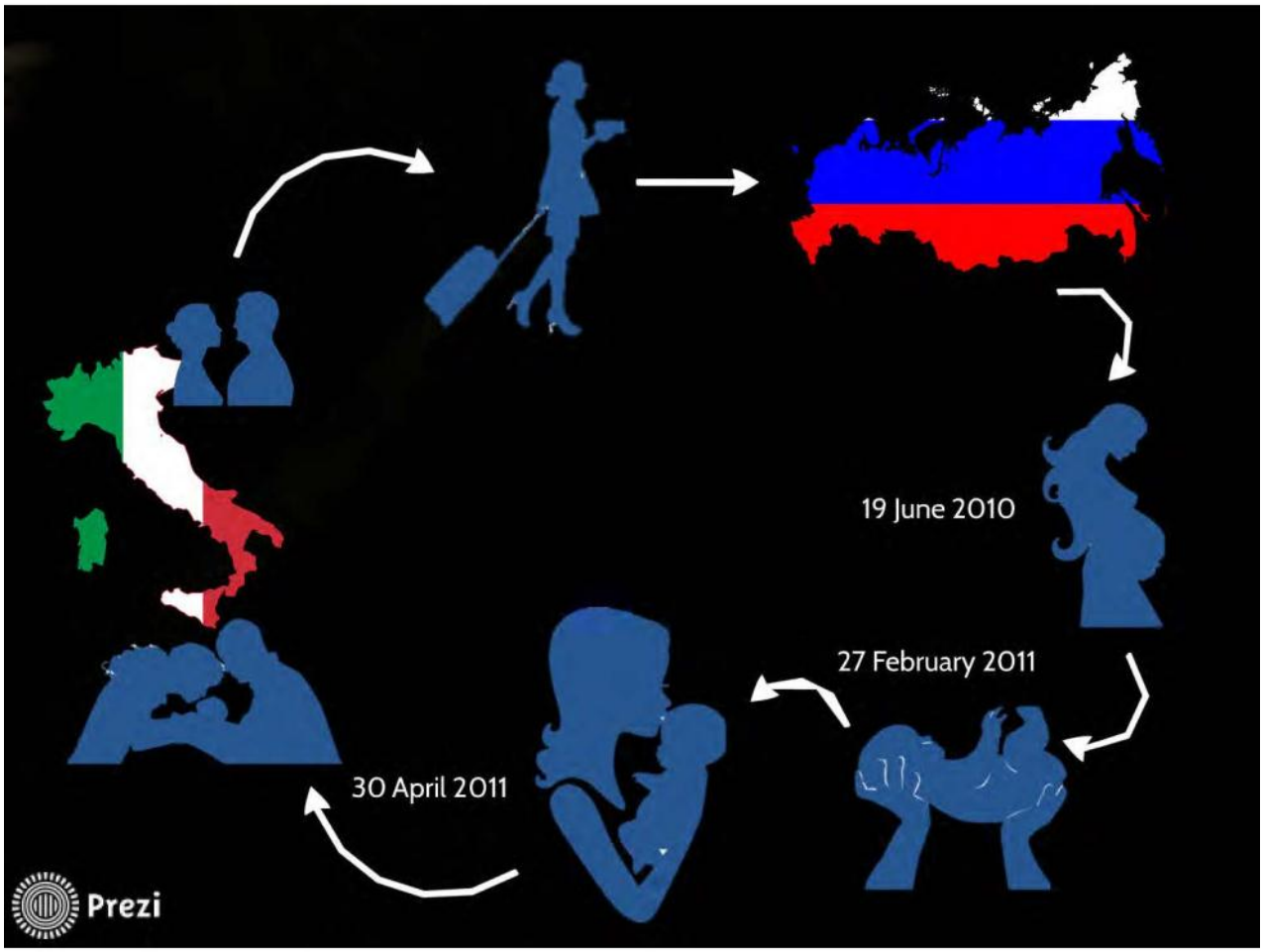
19 June 2010
27 February 2011
30 April 2011
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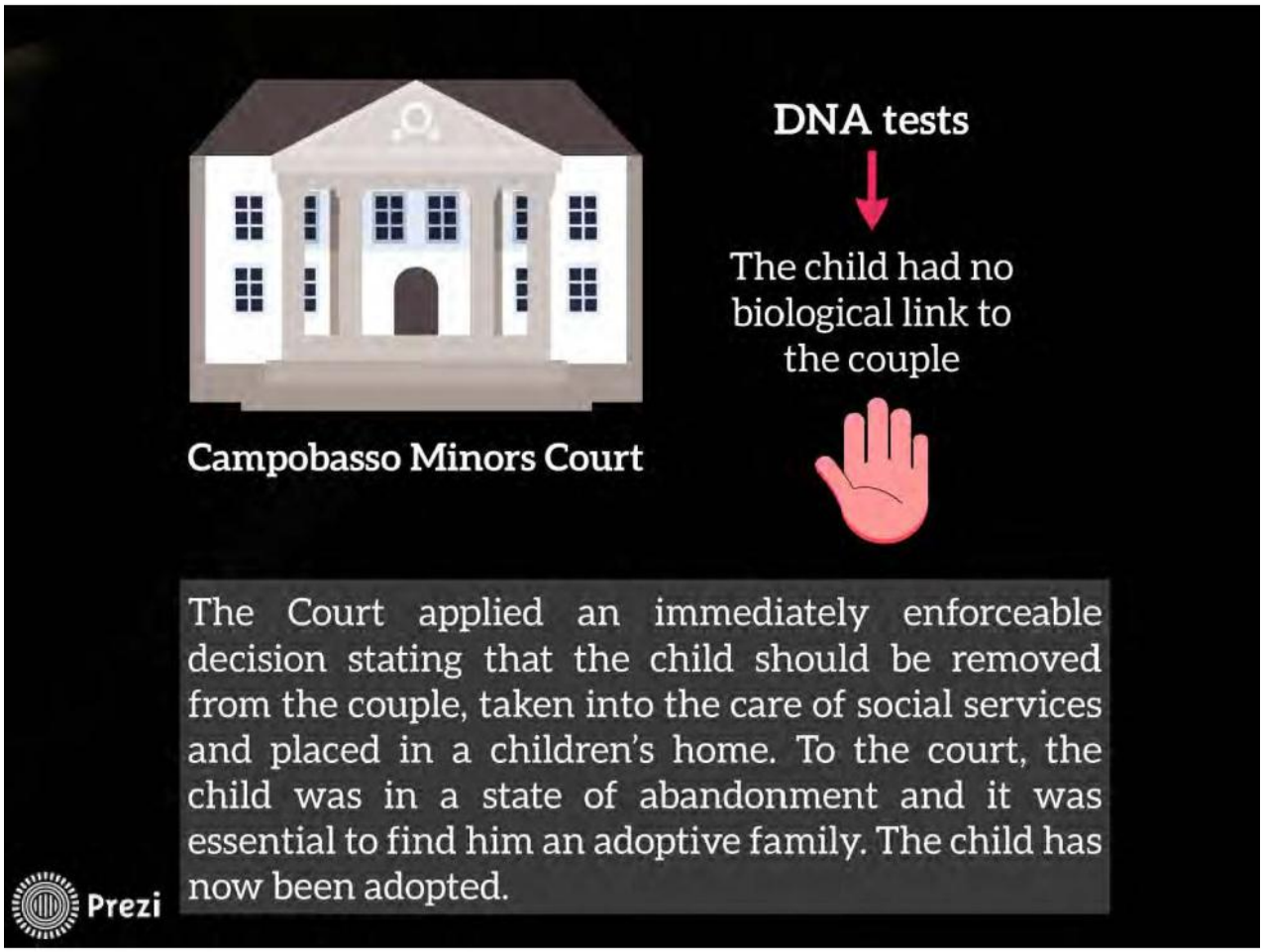
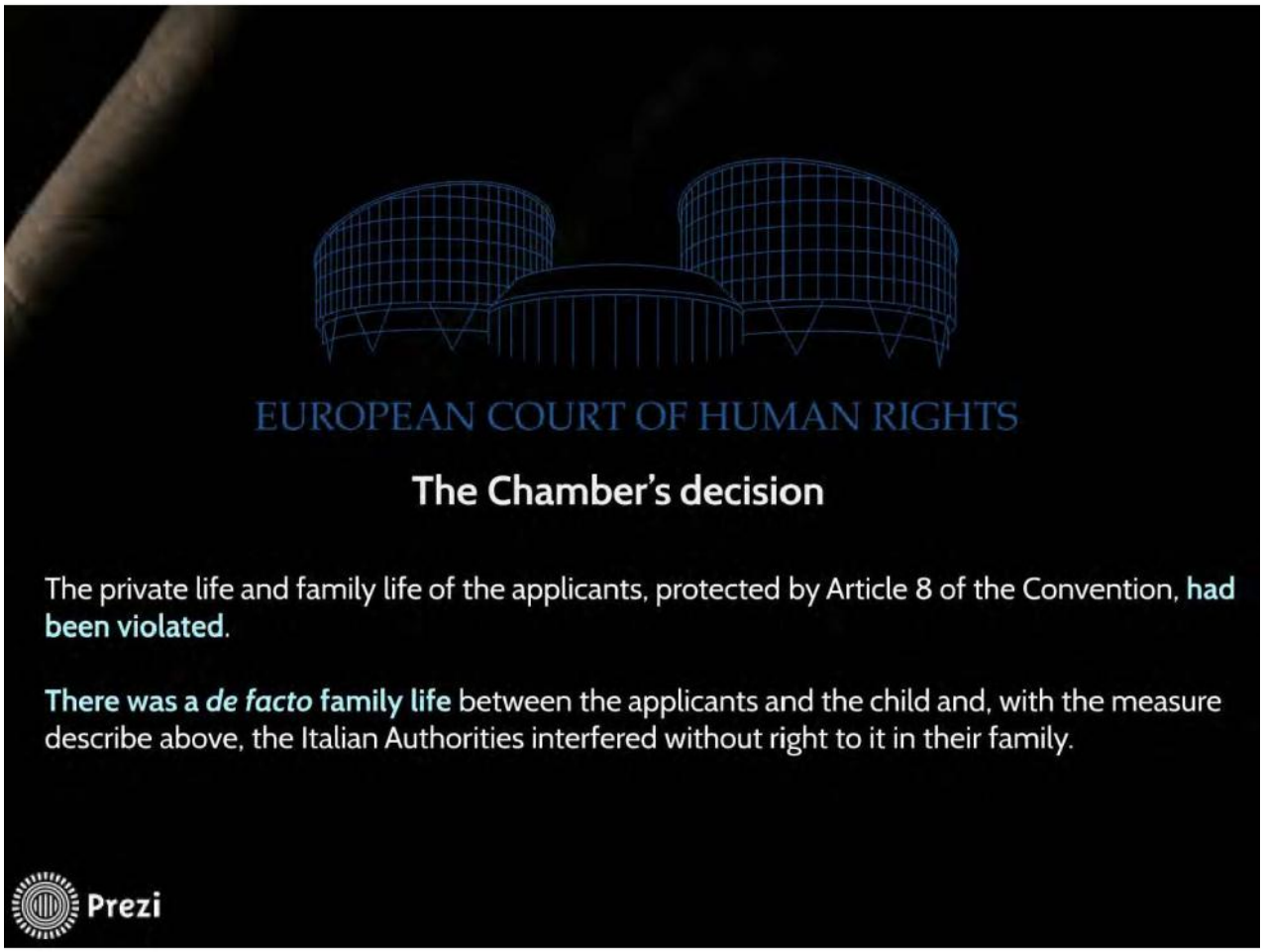

DNA tests
The child had no biological link to the couple
Campobasso Minors Court
The Court applied an immediately enforceable decision stating that the child should be removed from the couple, taken into the care of social services and placed in a children's home. To the court, the child was in a state of abandonment and it was essential to find him an adoptive family. The child has now been adopted.
Prezi


EUROPEAN COURT OF HUMAN RIGHTS
The Chamber's decision
The private life and family life of the applicants, protected by Article 8 of the Convention, had been violated.
There was a de facto family life between the applicants and the child and, with the measure describe above, the Italian Authorities interfered without right to it in their family.
Prezi


EUROPEAN COURT OF HUMAN RIGHTS
The Grand Chamber's decision
1. Whether Article 8 of the Convention is applicable;
2. Whether the urgent measures ordered by the Minors Court, which resulted in the child's removal, amount to an interference in the applicants' right to respect for their family life and/or their private life within the meaning of Article 8 § 1 of the Convention and, if so, whether the impugned measures were taken in accordance with Article 8 § 2 of the Convention.
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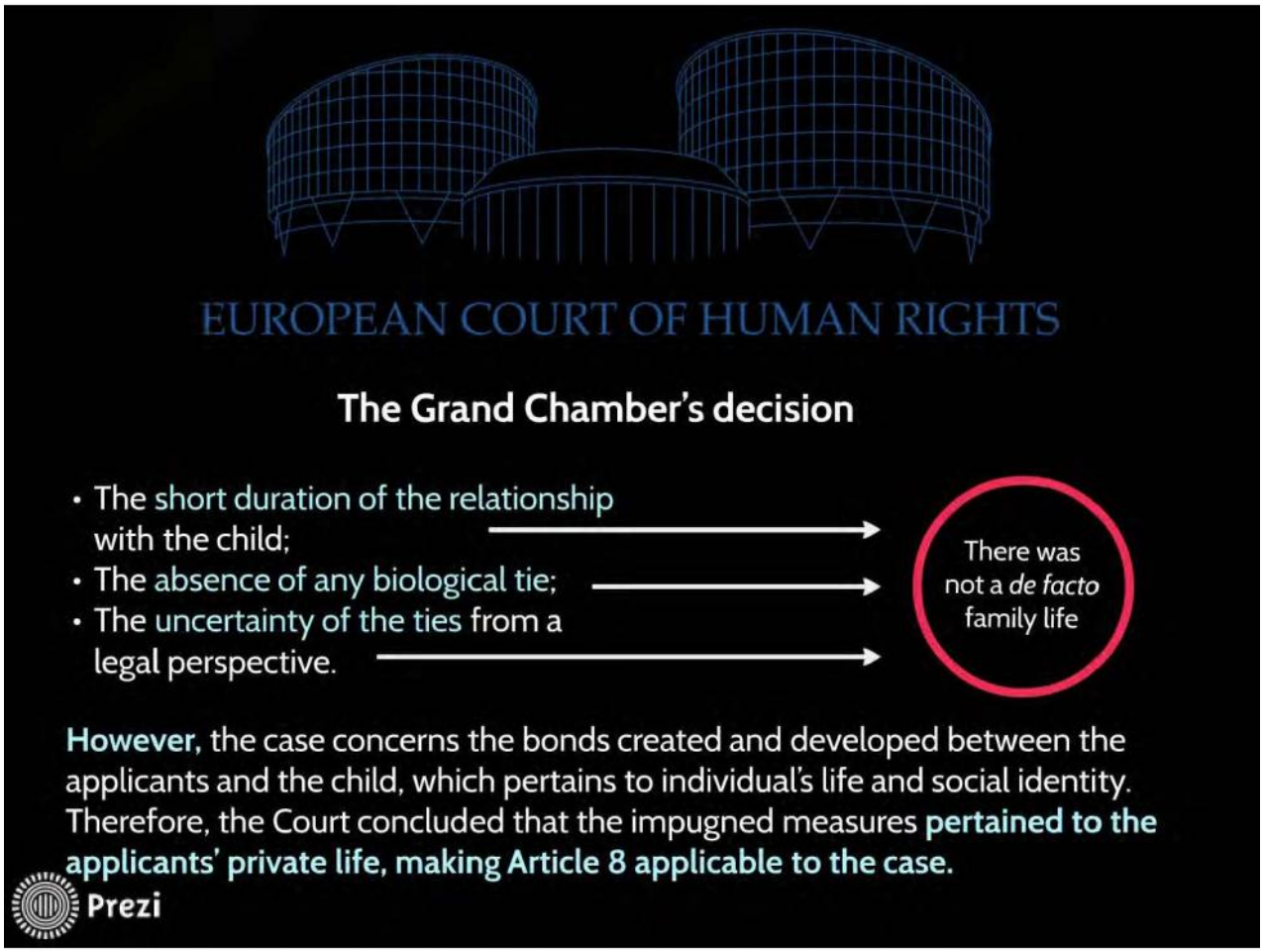
EUROPEAN COURT OF HUMAN RIGHTS
The Grand Chamber's decision
• The short duration of the relationship with the child;
• The absence of any biological tie;
• The uncertainty of the ties from a legal perspective.
There was not a de facto family life
However, the case concerns the bonds created and developed between the applicants and the child, which pertains to individual's life and social identity. Therefore, the Court concluded that the impugned measures pertained to the applicants' private life, making Article 8 applicable to the case.
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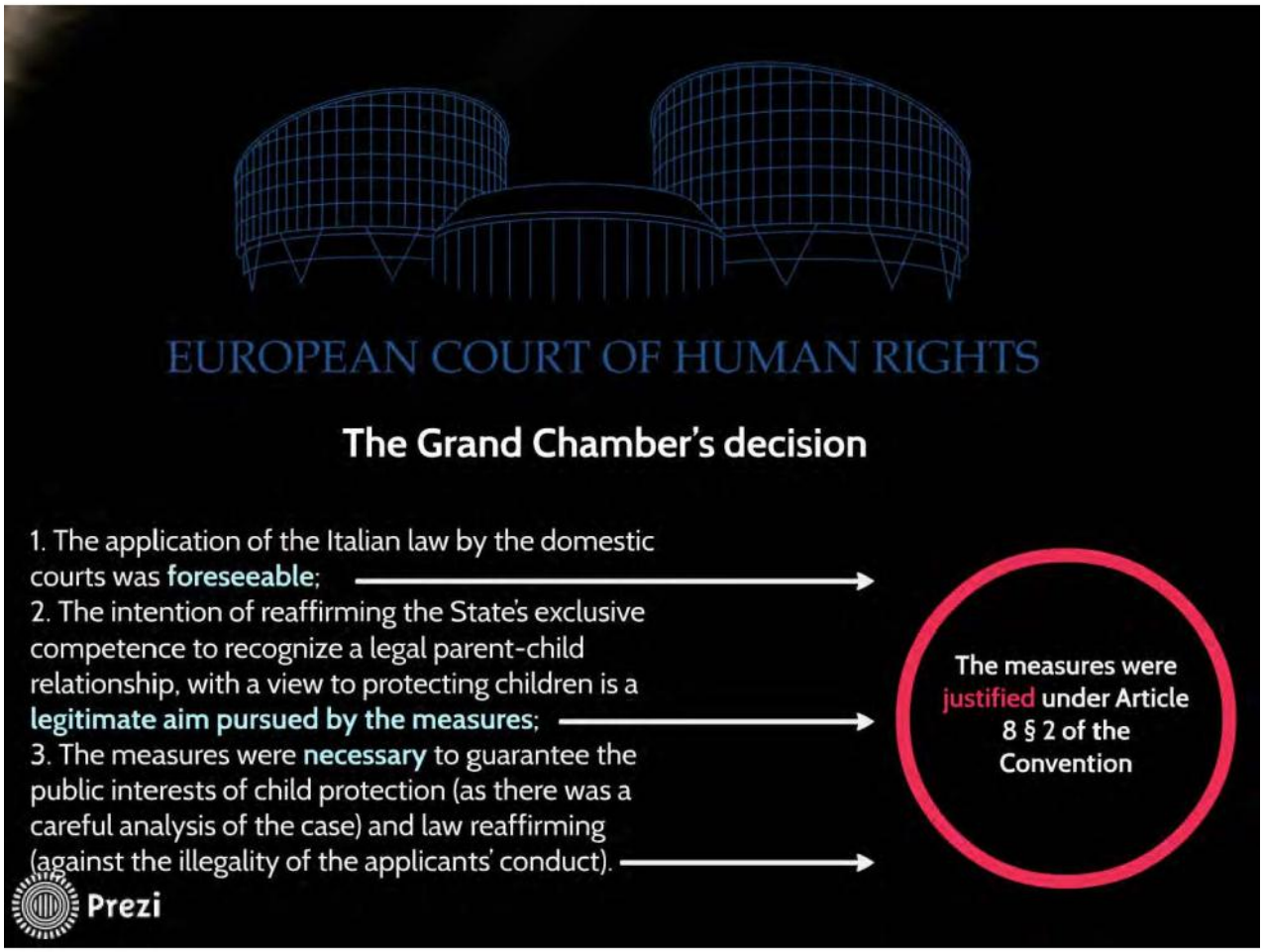
EUROPEAN COURT OF HUMAN RIGHTS
The Grand Chamber's decision
1. The application of the Italian law by the domestic courts was foreseeable;
2. The intention of reaffirming the State's exclusive competence to recognize a legal parent-child relationship, with a view to protecting children is a legitimate aim pursued by the measures;
3. The measures were necessary to guarantee the public interests of child protection (as there was a careful analysis of the case) and law reaffirming (against the illegality of the applicants' conduct).
The measures were justified under Article 8 § 2 of the Convention
Prezi


EUROPEAN COURT OF HUMAN RIGHTS
The Court held, by eleven votes to six, that there had been no violation of Article 8 of the Convention.
Prezi


EUROPEAN COURT OF HUMAN RIGHTS
Only a few cases involving surrogacy have been decided by the European Court of Human Rights:
• S.H. and Others v. Austria (Application No. 57813/00)
• Mennesson v. France (Application No. 65192/11) and Labassee v. France (Application No. 65941/11)
• Foulon v. France (Application No. 9063/14) and Bouvet v. France (Application No. 10410/14)
Prezi


EUROPEAN COURT OF HUMAN RIGHTS
The Court have always considered that these surrogacy cases fall within the scope of Article 8 of the Convention.
• Violation of this Article as regard its family life perspective?
• Violation of the child's right to private life, when there is a refusal of legal recognition to parent-child relationships?
Could the Court have taken these opportunities to adopt a clear position on this matter?
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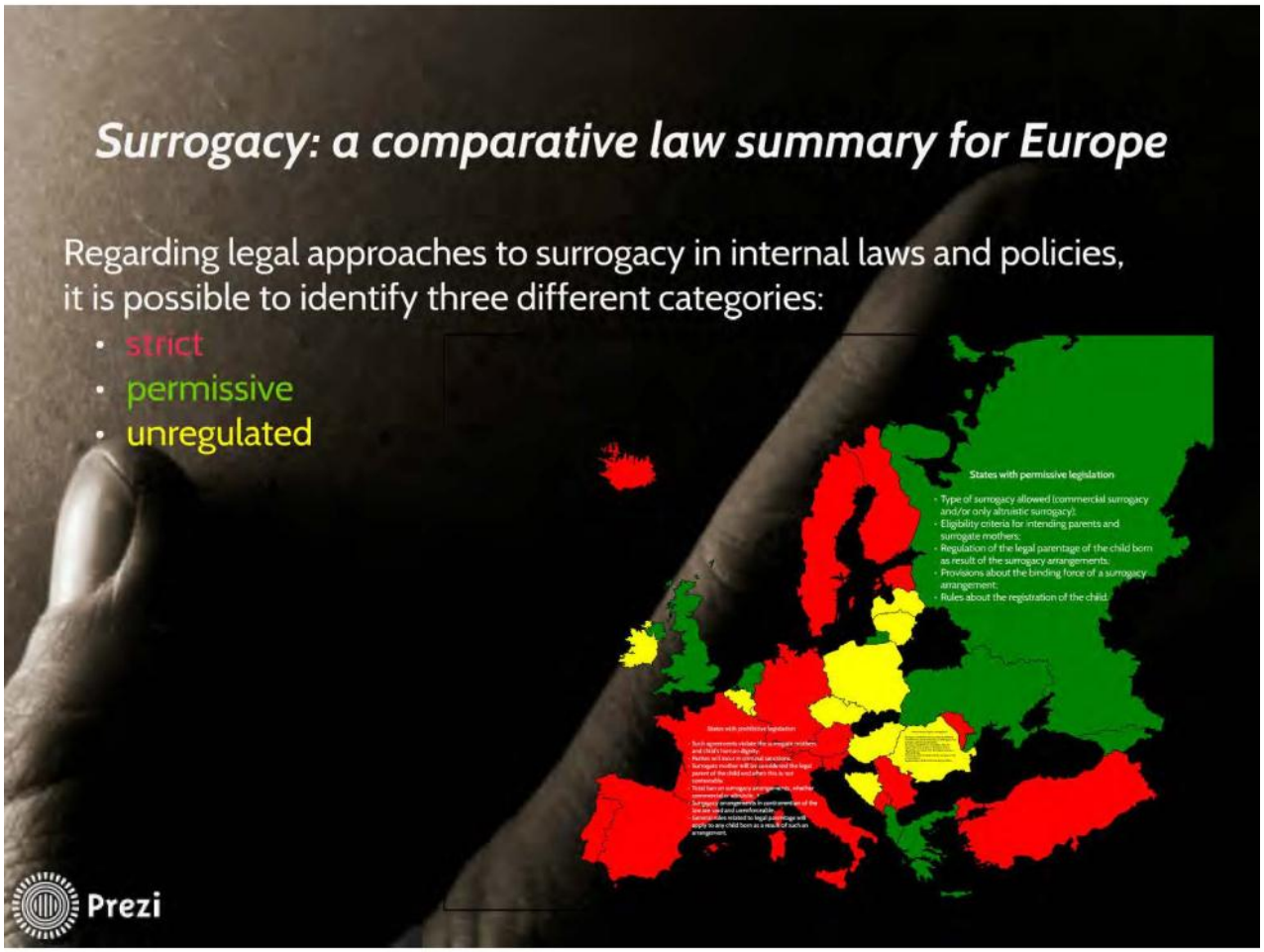
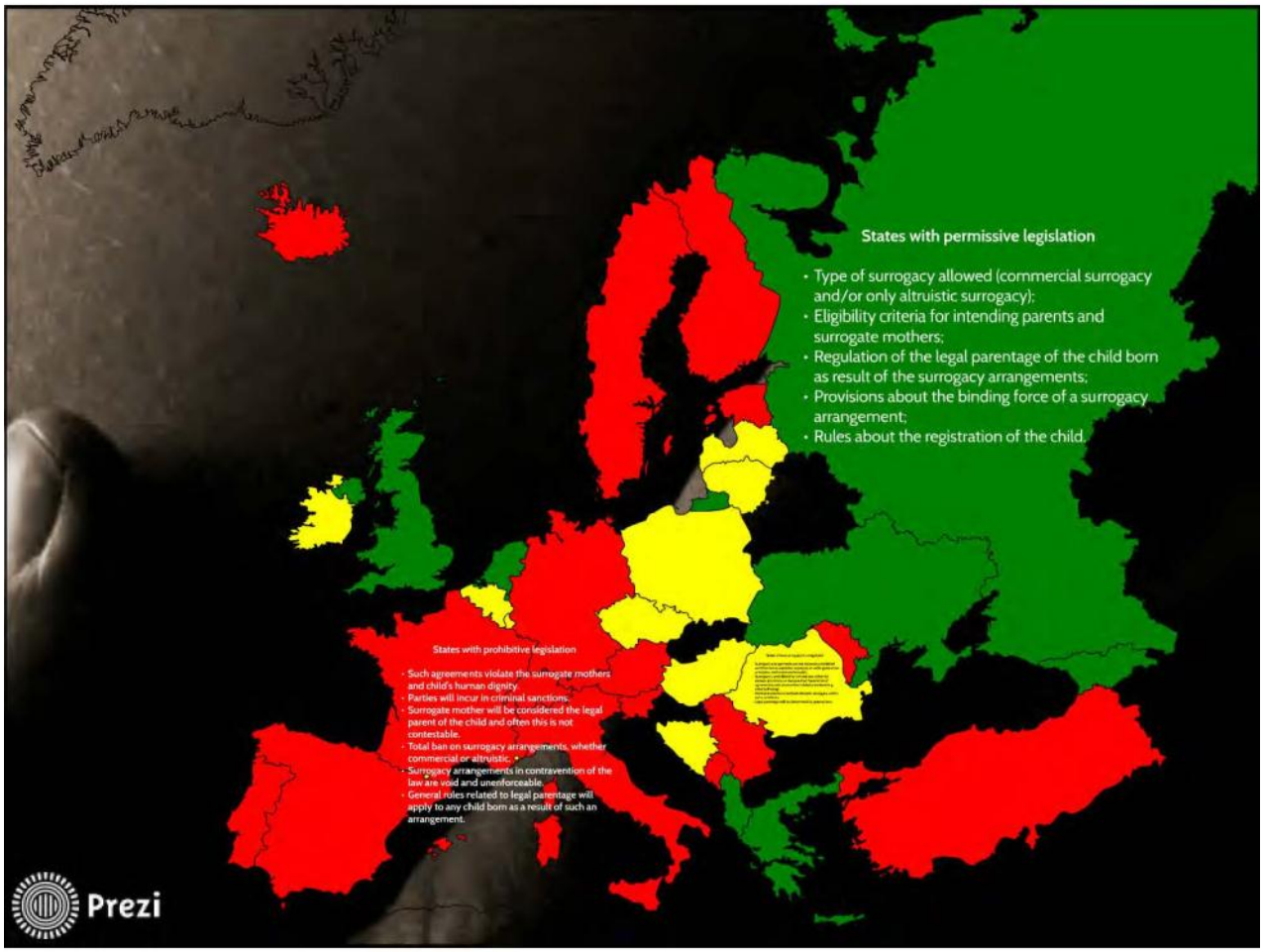

Surrogacy: a comparative law summary for Europe
Regarding legal approaches to surrogacy in internal laws and policies, it is possible to identify three different categories:
strict
permissive
unregulated
States with permissive legislation
Type of surrogacy allowed (commercial surrogacy and/or only altruistic surrogacy);
Eligibility criteria for intending parents and surrogate mothers;
Regulation of the legal parentage of the child born as result of the surrogacy arrangements;
Provisions about the binding force of a surrogacy arrangement;
Rules about the registration of the child.
Prezi


States with permissive legislation
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• Regulation of the legal parentage of the child born as result of the surrogacy arrangements;
• Provisions about the binding force of a surrogacy arrangement;
• Rules about the registration of the child.
States with prohibitive legislation
• Such agreements violate the surrogate mothers and child's human dignity.
• Parties will incur in criminal sanctions.
• Surrogate mother will be considered the legal parent of the child and often this is not contestable.
• Total ban on surrogacy arrangements, whether commercial or altruistic.
• Surrogacy arrangements in contravention of the law are void and unenforceable.
• General rules related to legal parentage will apply to any child born as a result of such an arrangement.
Prezi


States with permissive legislation
• Type of surrogacy allowed (commercial surrogacy and/or only altruistic surrogacy);
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Prezi


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• General rules related to legal parentage will apply to any child born as a result of such an arrangement.
Prezi


States where surrogacy is unregulated
• Surrogacy arrangements are not expressly prohibited and their terms are either expressly or under general law principles, void and unenforceable.
• Surrogacy is prohibited by criminal law, either by express provisions or because that these kinds of agreements contravene other related provisions (e.g. child trafficking).
• Medical institutions facilitate altruistic surrogacy, within strict conditions.
• Legal parentage will be determined by general laws.
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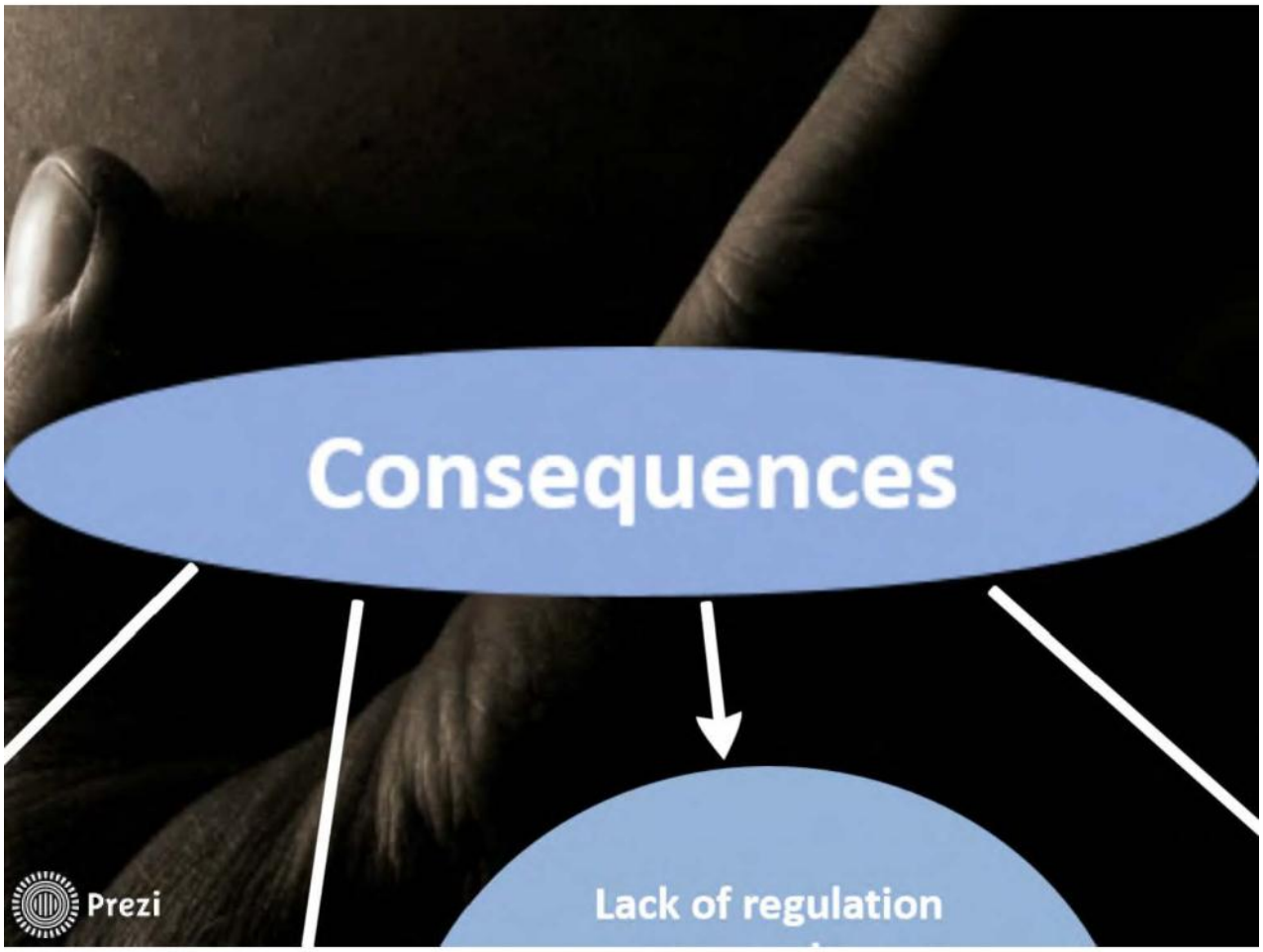
Consequences
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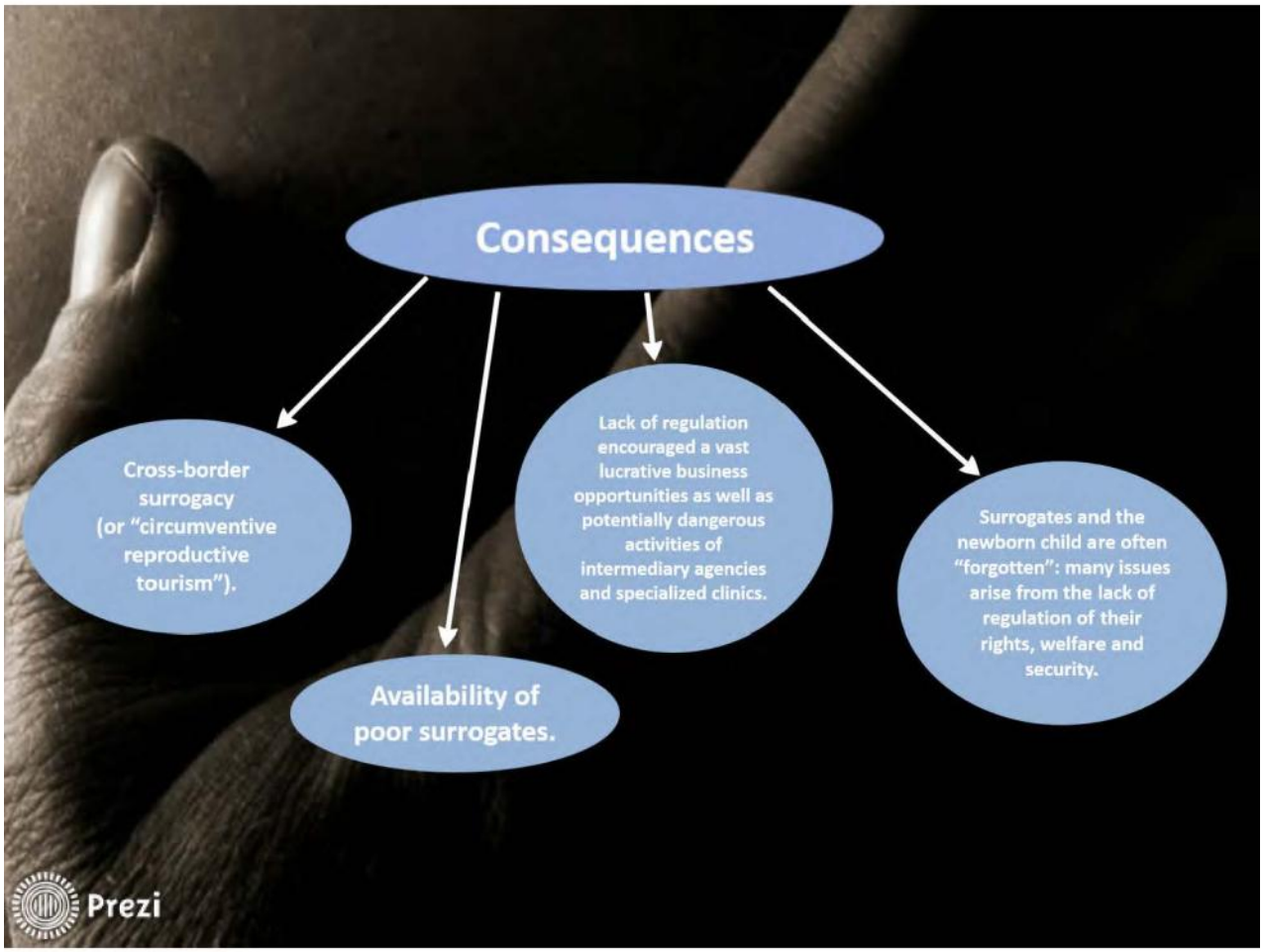
Lack of regulation


Consequences
Cross-border surrogacy (or "circumventive reproductive tourism").
Availability of poor surrogates.
Lack of regulation encouraged a vast lucrative business opportunities as well as potentially dangerous activities of intermediary agencies and specialized clinics.
Surrogates and the newborn child are often "forgotten": many issues arise from the lack of regulation of their rights, welfare and security.
Prezi


IVF gets cheaper, brings hope to 3rd world nations
Selfless sister gave me the gift of a son
Surrogacy — a medical
CHARLIE HEBDO
LA GPA, C'EST 2 PARENTS
..ET UNE ESCLAVE..
THEMIS NEWS
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THE BABY FACTORY
Centre's rider
SURROGATE MOM WHO REFUSED A
IN LEGAL BATTLE OVER CUSTODY
FOX NEWS
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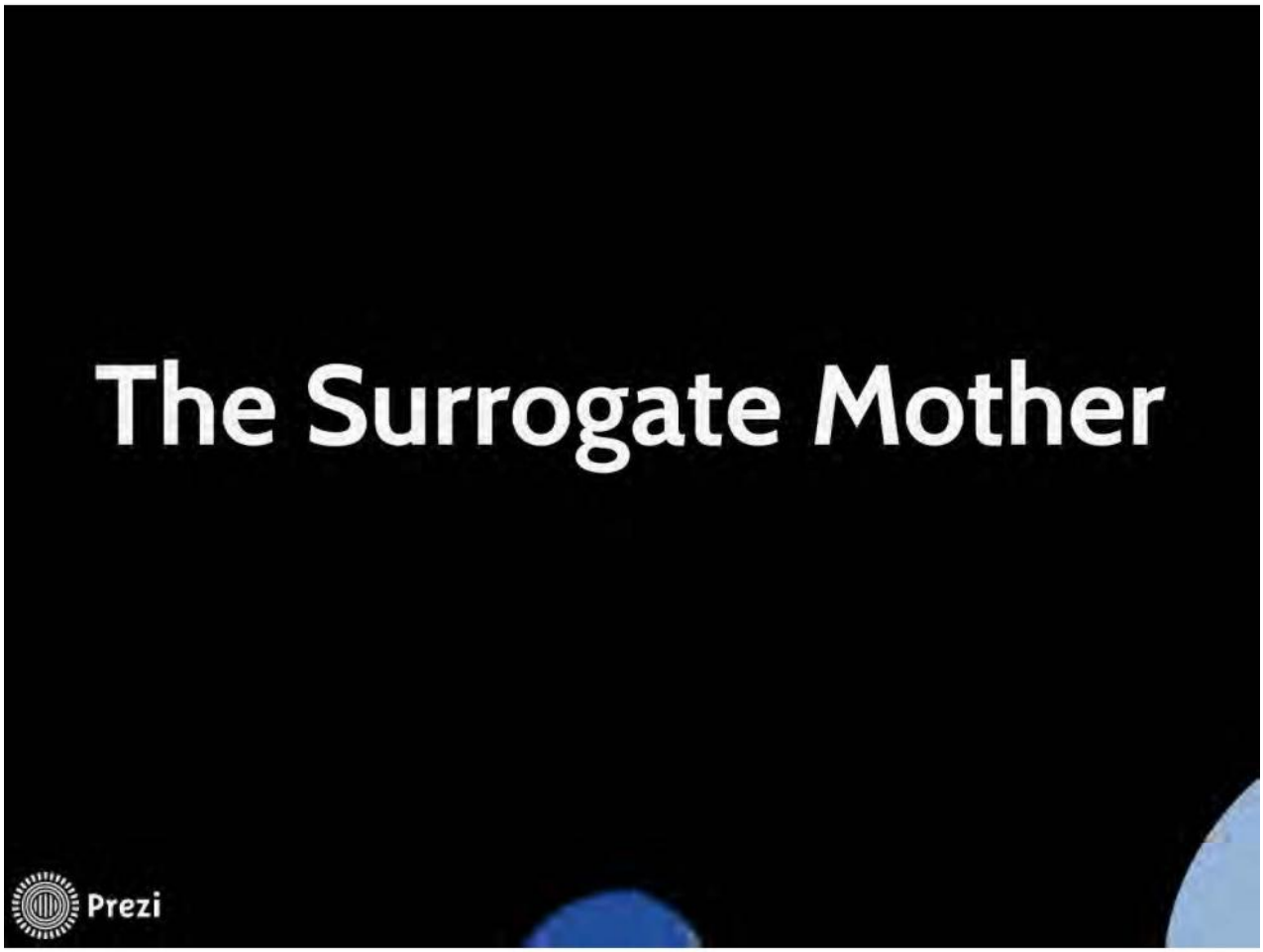
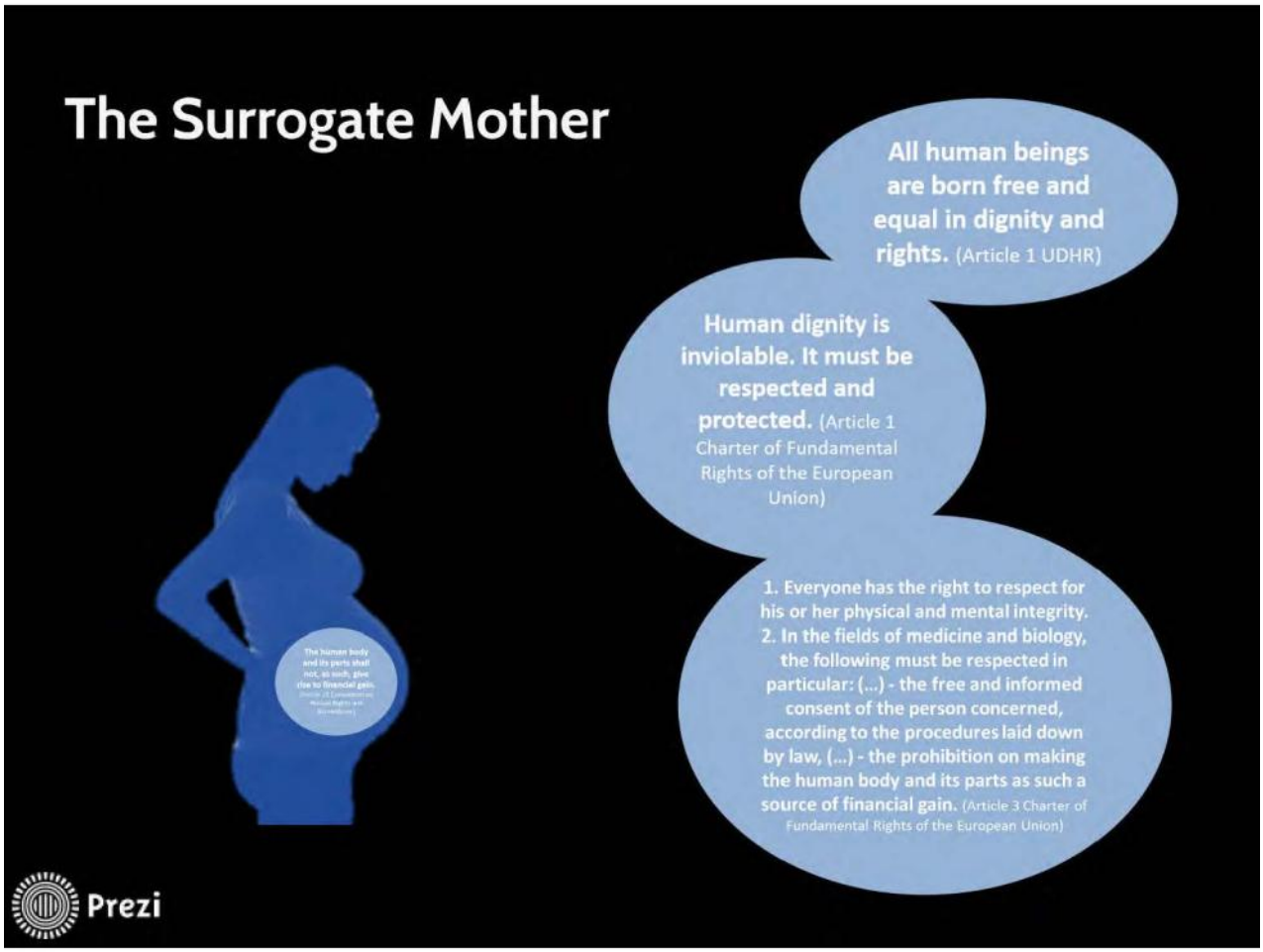
Surrogacy is a present-day issue, which divides people and leaves no one impassive, because of the moral and ethical questions it raises – far beyond the medical point of view. In fact, globalization, the medical achievements and declining fertility rates have put this subject on the agenda.

What is surrogacy, then? It is a way of having children in which a woman – the surrogate – gets pregnant having already decided to give the child away to someone else, with whom she made an arrangement – the intending (or intended) parent(s).
Regarding all this, we will approach the subject of surrogacy from both ethical and legal perspectives, taking into account the implications caused by the fact that the approaches around the world – and even across Europe - are multiple and sometimes hardly compatible.


The Intending Parents
nd a family
Prezi


The Intending Parents
Right to found a family
• Article 16 of the Universal Declaration of Human Rights
• Article 8 of the European Convention on Human Rights
• Article 9 of the Charter of Fundamental Rights of the European Union
Intending parents call themselves "reproductive refugees".
Does the right to found a family really mean that there is a reproductive right?
The European Court of the Human Rights reiterates that even the right to found a family seems not to be absolute.
Prezi


The Surrogate Mother
Prezi


The Surrogate Mother
All human beings are born free and equal in dignity and rights. (Article 1 UDHR)
Human dignity is inviolable. It must be respected and protected. (Article 1 Charter of Fundamental Rights of the European Union)
1. Everyone has the right to respect for his or her physical and mental integrity. 2. In the fields of medicine and biology, the following must be respected in particular: (...) - the free and informed consent of the person concerned, according to the procedures laid down by law, (...) - the prohibition on making the human body and its parts as such a source of financial gain. (Article 3 Charter of Fundamental Rights of the European Union)
Prezi


The human body and its parts shall not, as such, give rise to financial gain.
(Article 21 Convention on Human Rights and Biomedicine)
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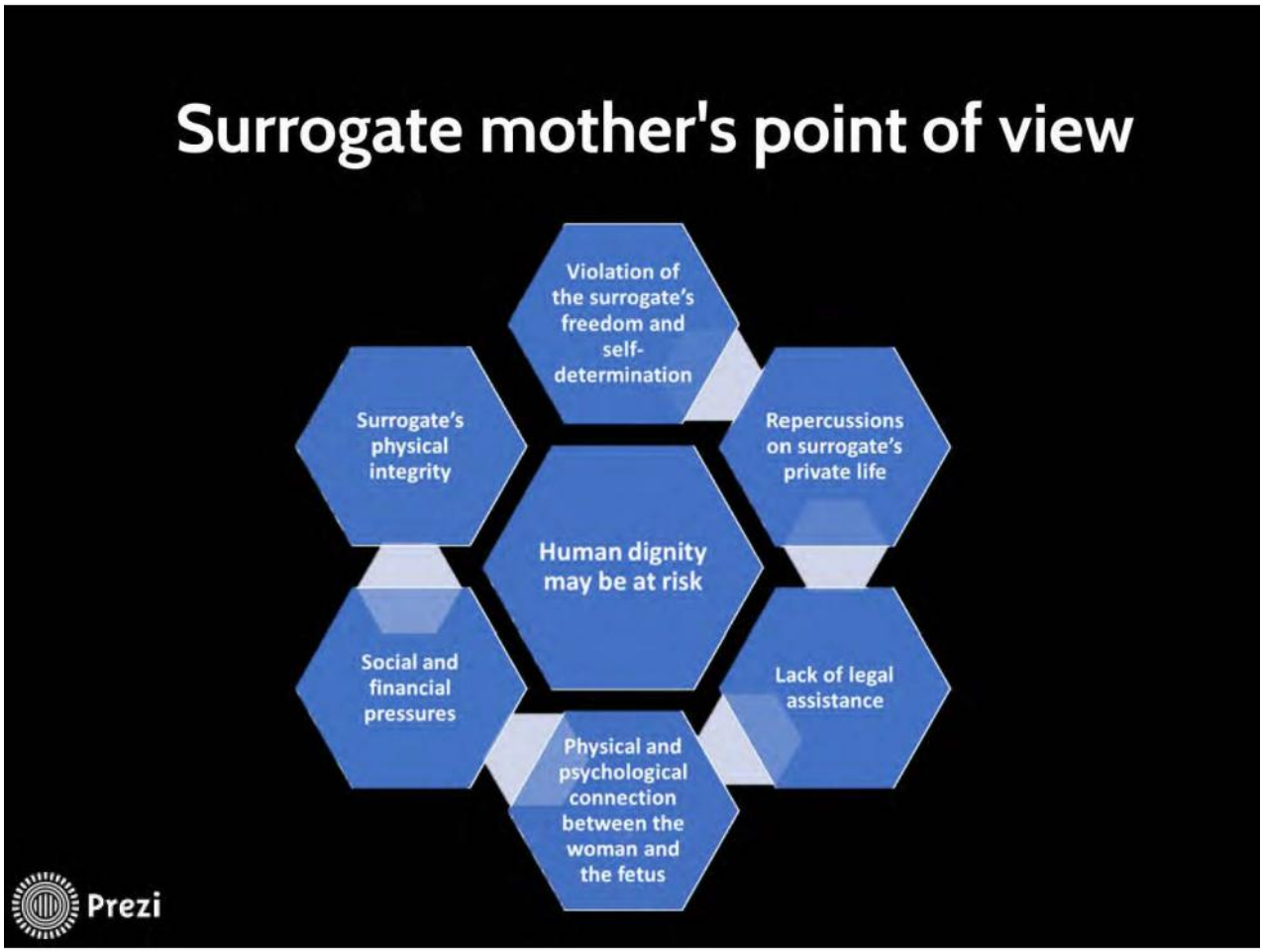
Surrogate mother's point of view
Violation of the surrogate's freedom and self-determination
Surrogate's physical integrity
Repercussions on surrogate's private life
Human dignity may be at risk
Social and financial pressures
Lack of legal assistance
Physical and psychological connection between the woman and the fetus
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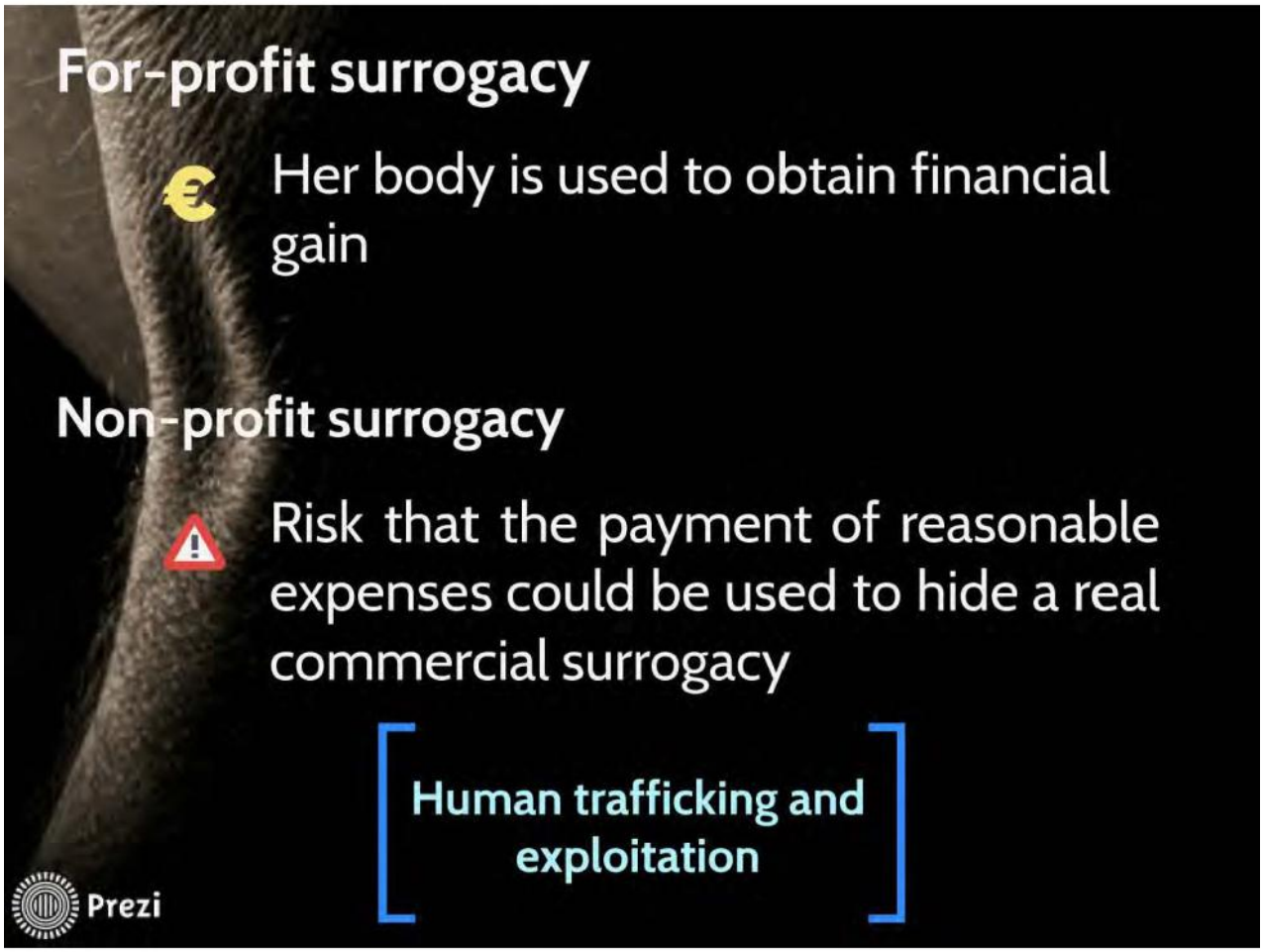
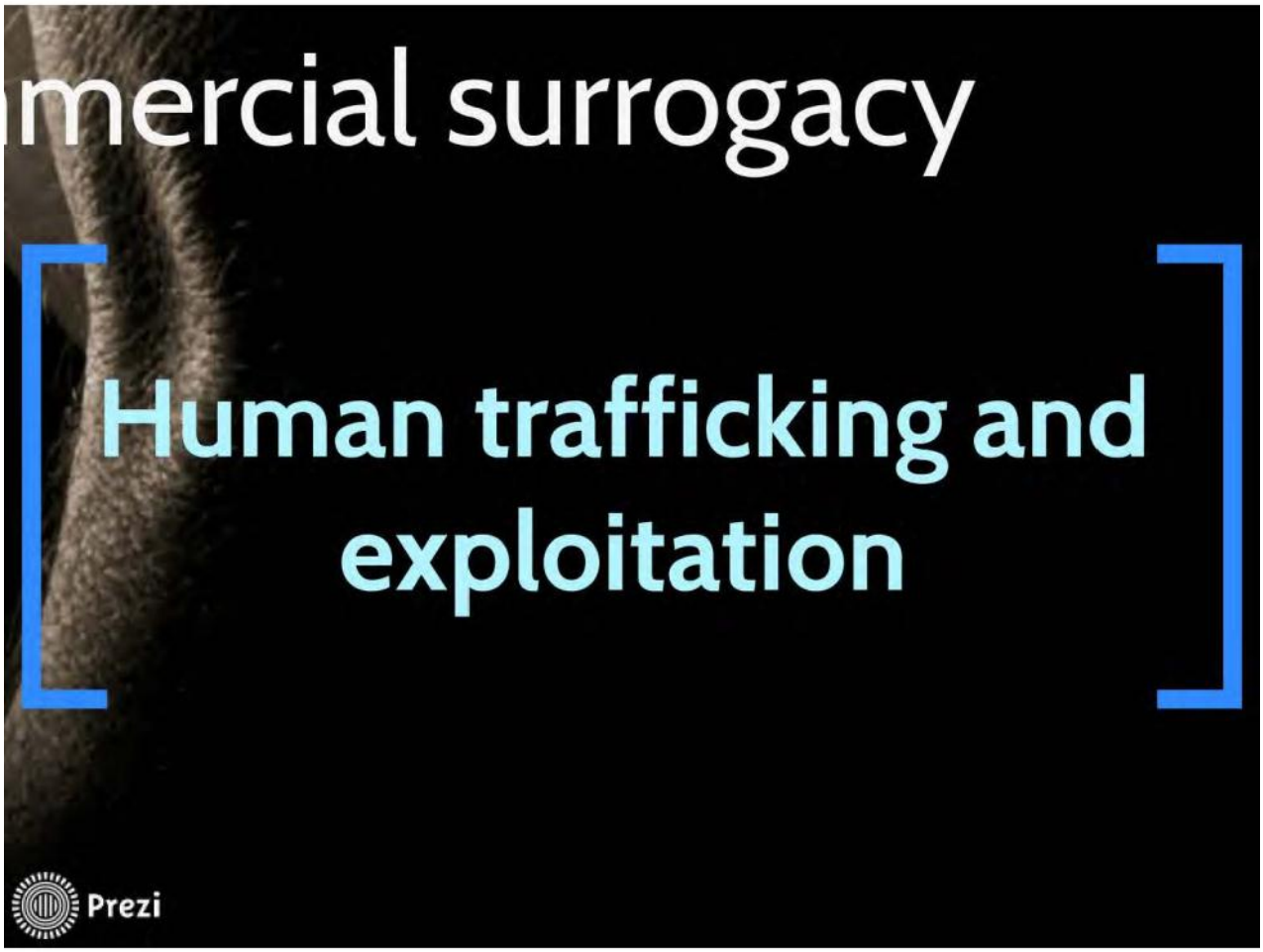

For-profit surrogacy
Her body is used to obtain financial gain
Non-profit surrogacy
Risk that the payment of reasonable expenses could be used to hide a real commercial surrogacy
Human trafficking and exploitation
Prezi


mercial surrogacy
Human trafficking and exploitation
Prezi


The Child
Prezi


Right to life (Article 6 § 1 UNCRC)
"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration" (Article 3 UNCRC)
Right to not be separated from their parents against their will, except in some circumstances specified in the Convention (Article 9 UNCRC)
Right to be registered immediately after birth, to have a name, to acquire a nationality and the right to know and be cared for by their parents (Article 6 § 1 UNCRC)
Right to right to preserve their identity (nationality, name and family relations) and to their private and family life (Articles 8 and 16 UNCRC)
The Child
Prezi


Ri
life
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"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration" (Article 3 UNCRC)
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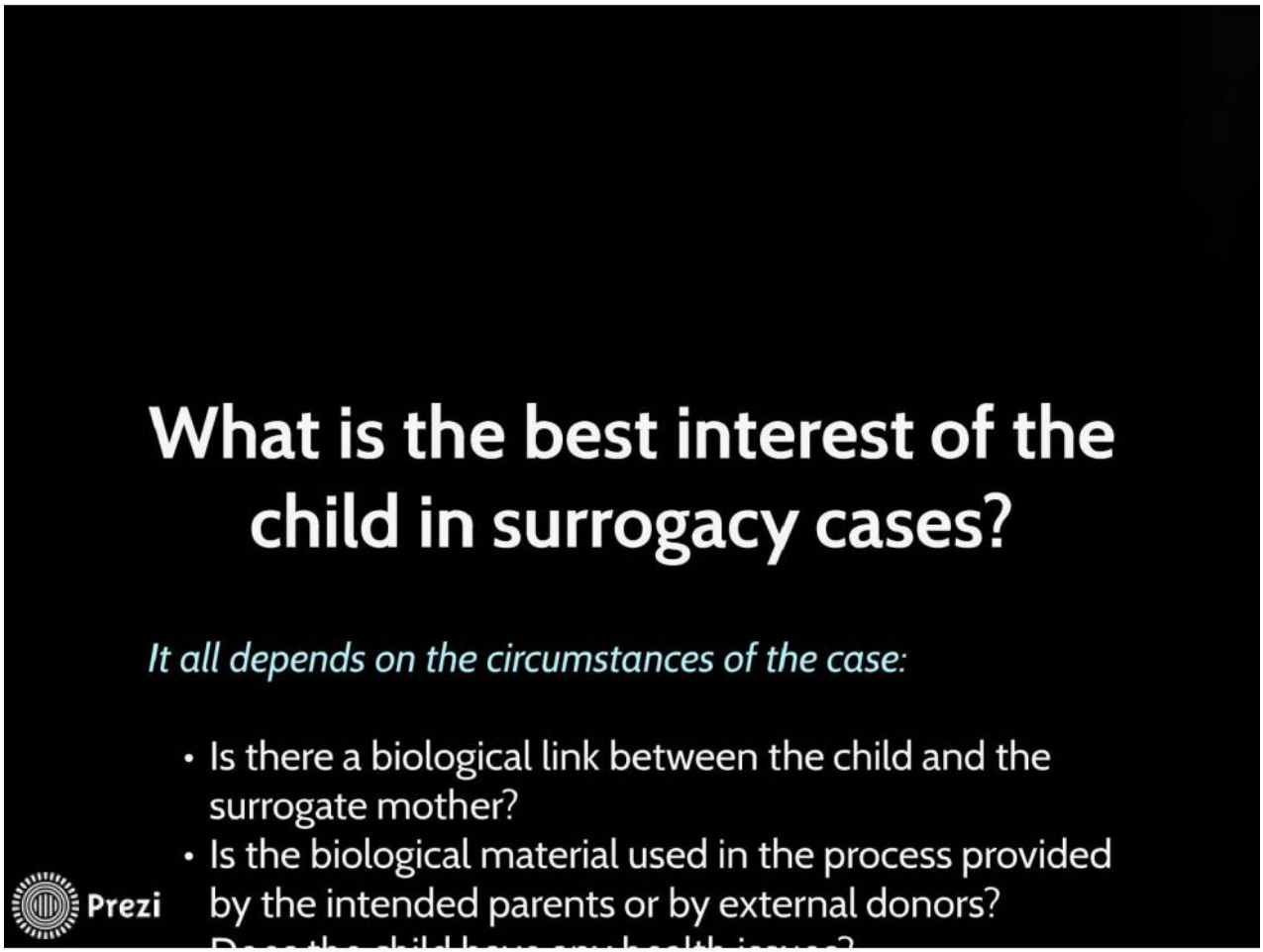
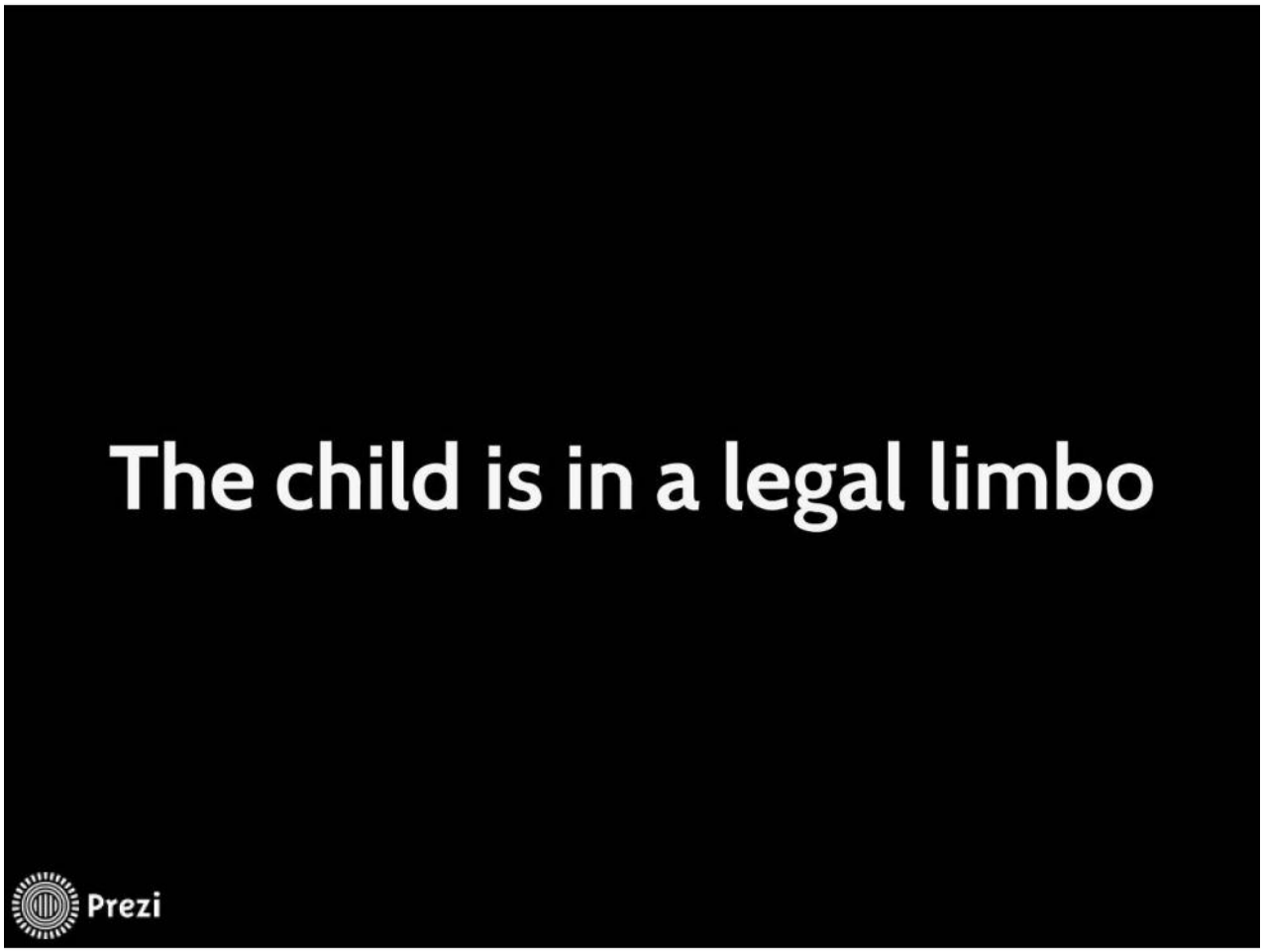

What is the best interest of the child in surrogacy cases?
It all depends on the circumstances of the case:
• Is there a biological link between the child and the surrogate mother?
• Is the biological material used in the process provided by the intended parents or by external donors?
Prezi


What is the best interest of the child in surrogacy cases?
It all depends on the circumstances of the case:
• Is there a biological link between the child and the surrogate mother?
• Is the biological material used in the process provided by the intended parents or by external donors?
• Does the child have any health issues?
• Is the child's birth the result of an international surrogacy agreement?
Prezi


The child is in a legal limbo
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In these types of situations children are exposed to several risks
Abandonment or abuse
Becoming stateless
Human trafficking
Not having a legal parentage established
Not knowing their origins
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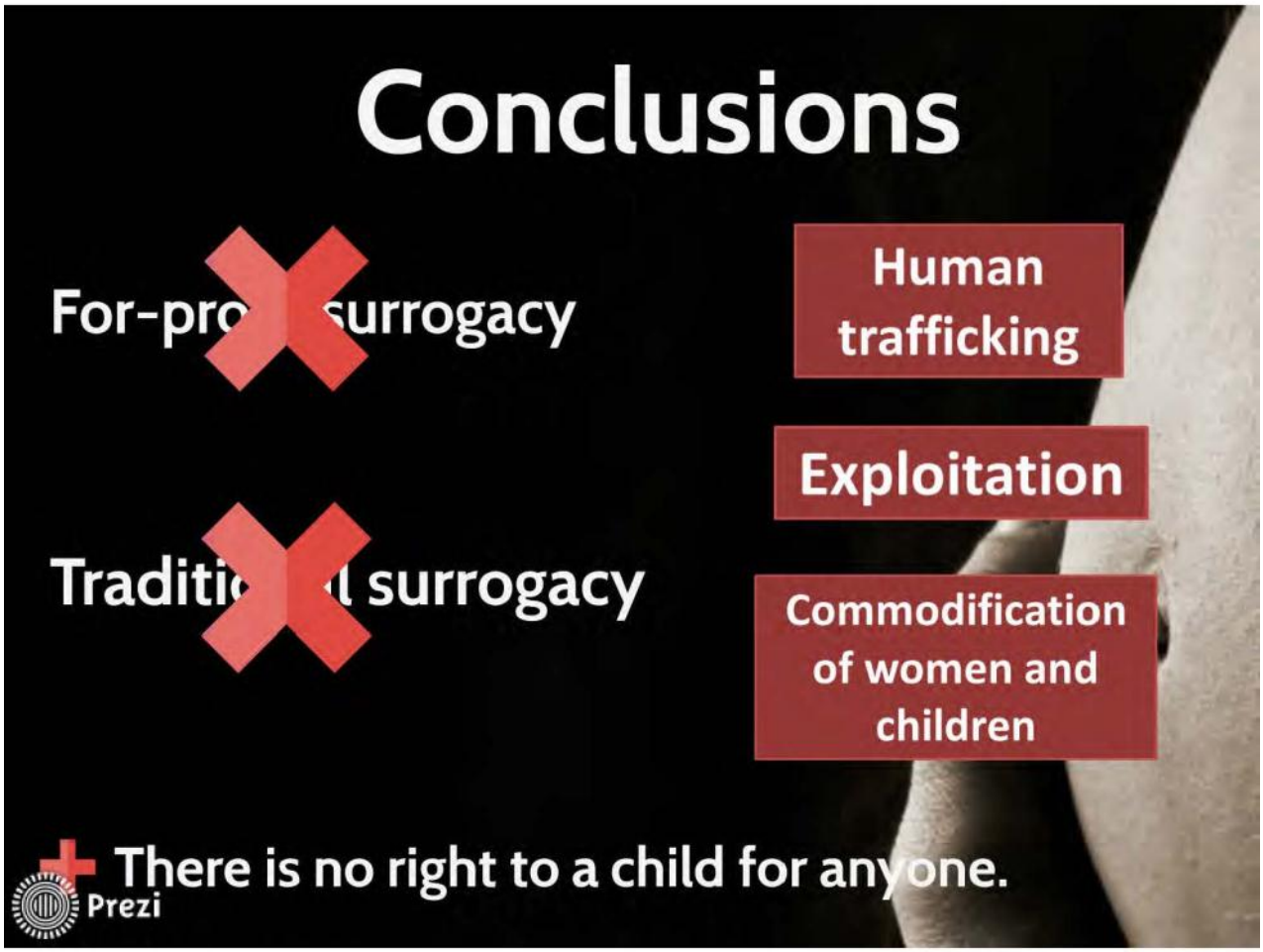
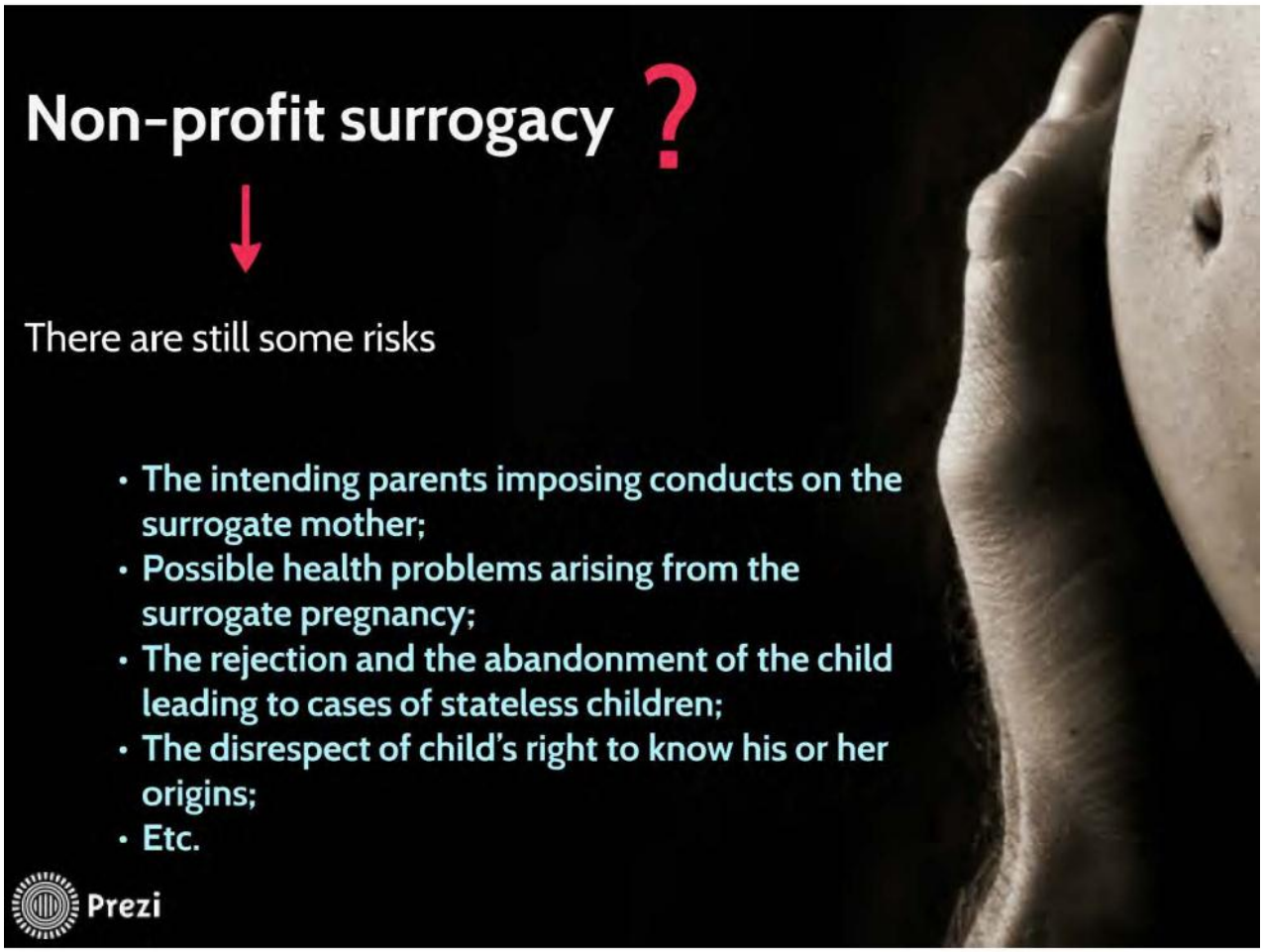
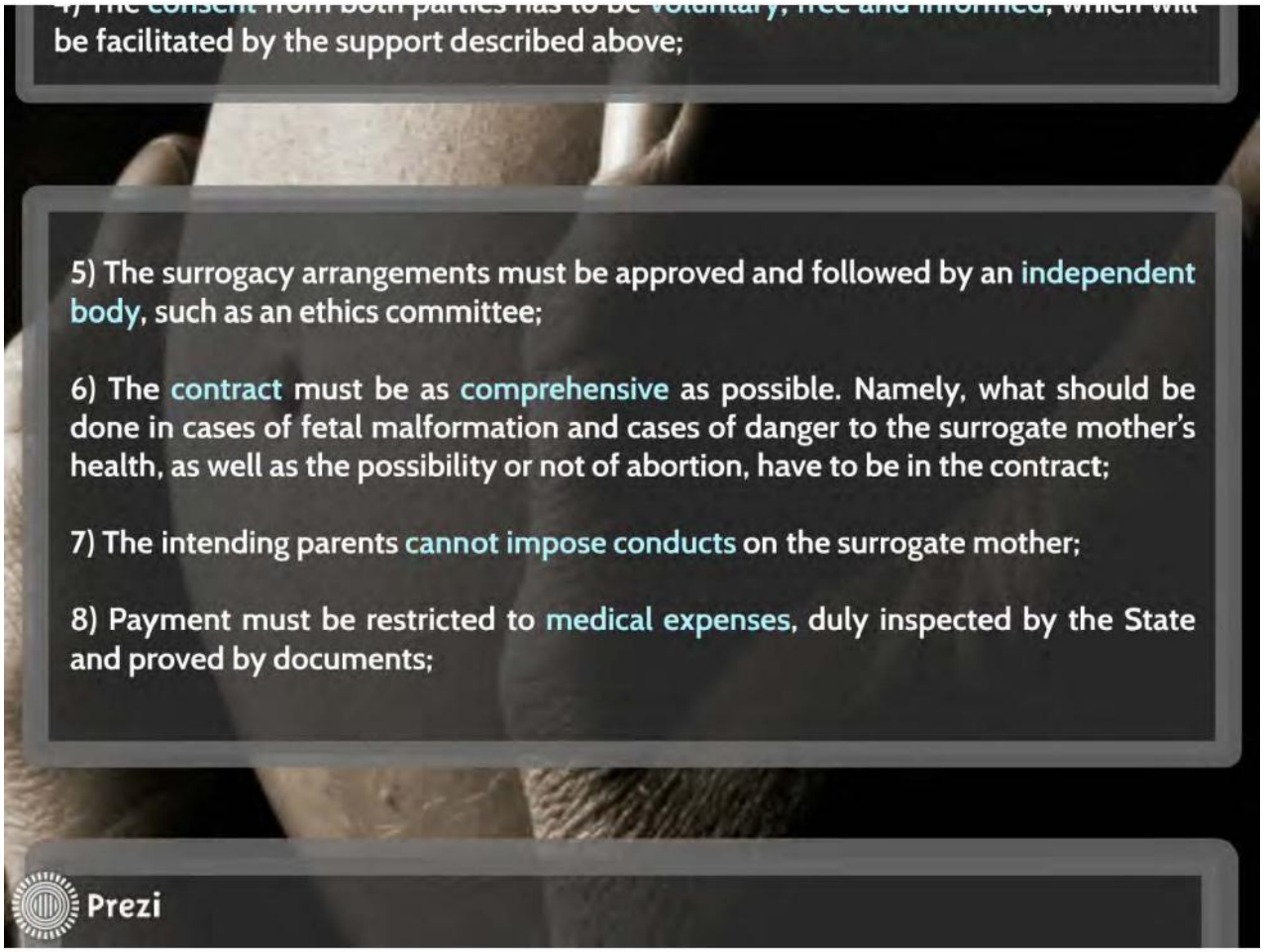
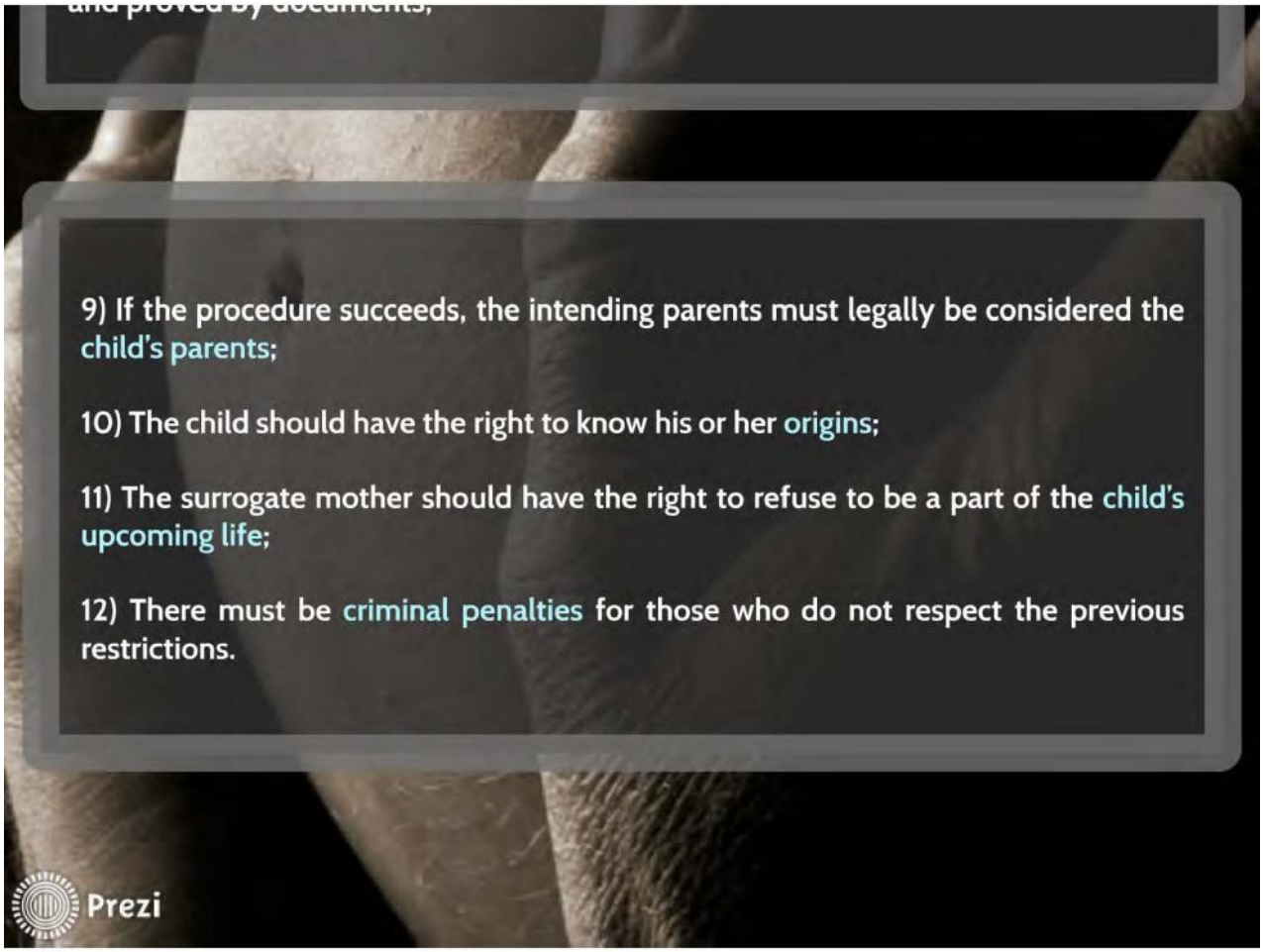

Conclusions
For-pro surrogacy
Traditi l surrogacy
Human trafficking
Exploitation
Commodification of women and children
There is no right to a child for anyone.
Prezi


Non-profit surrogacy ?
There are still some risks
• The intending parents imposing conducts on the surrogate mother;
• Possible health problems arising from the surrogate pregnancy;
• The rejection and the abandonment of the child leading to cases of stateless children;
• The disrespect of child's right to know his or her origins;
• Etc.
Prezi


However
As long as the total prohibition would possibly lead to
• Underground services
• "Circumventive reproductive tourism"
Prezi


States must have a very careful legislation
1) Surrogacy should be permitted only in certain cases, such as where there is a lack of uterus or an injury or illness related to it that absolutely and definitively rules out the chance of pregnancy;
2) The child must have a genetic link with, at least, one of the intending parents and must not have any genetic material from the surrogate mother;
3) Prior and subsequent to consent, medical, psychological and legal support to all the parties (intending parents and surrogate mother) must be provided. In sum, both parties should have all the relevant information about the surrogacy arrangement;
4) The consent from both parties has to be voluntary, free and informed, which will be facilitated by the support described above;
Prezi


be facilitated by the support described above;
5) The surrogacy arrangements must be approved and followed by an independent body, such as an ethics committee;
6) The contract must be as comprehensive as possible. Namely, what should be done in cases of fetal malformation and cases of danger to the surrogate mother's health, as well as the possibility or not of abortion, have to be in the contract;
7) The intending parents cannot impose conducts on the surrogate mother;
8) Payment must be restricted to medical expenses, duly inspected by the State and proved by documents;
Prezi


9) If the procedure succeeds, the intending parents must legally be considered the child's parents;
10) The child should have the right to know his or her origins;
11) The surrogate mother should have the right to refuse to be a part of the child's upcoming life;
12) There must be criminal penalties for those who do not respect the previous restrictions.
Prezi


URGENT
International
Convention
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SURROGACY:
A CLASH OF COMPETING RIGHTS
Team Portugal II
Filipa Redondo | Filipa Valente | Maria João Esteves
Prezi
HCCH

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